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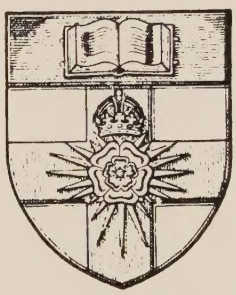

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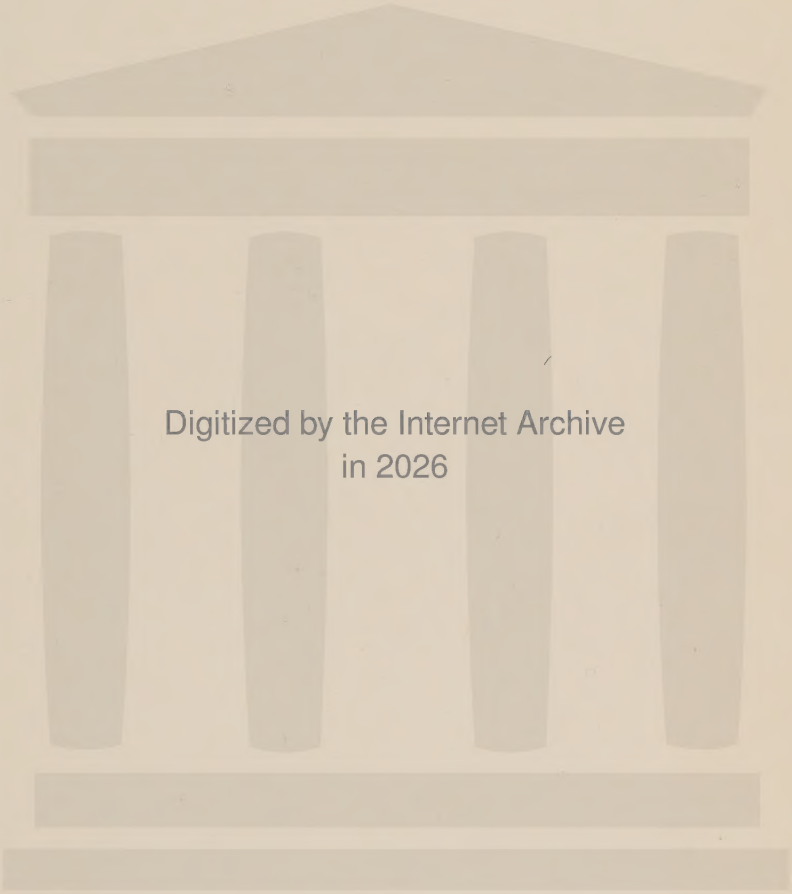
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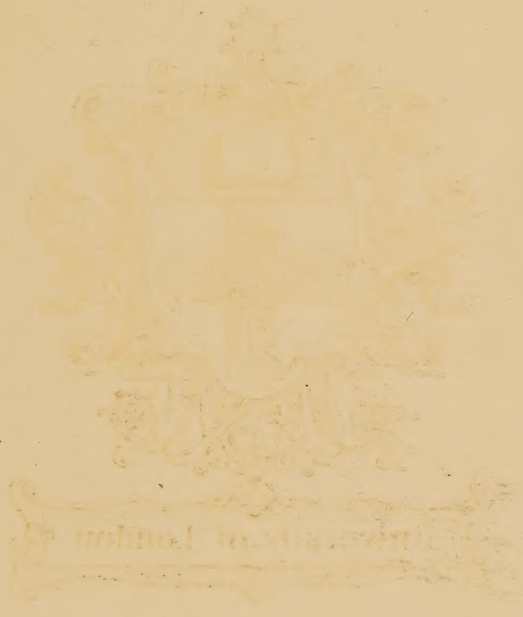

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1909.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Annie, The		176

B.

Boucau, The		163
Brydges *v.* Brydges	(C. A.)	187
Buteshire, The		170

C.

Cadeby, The		257
Cardiff, The		183
Carter, Hopkinson *v.* In re Hailstone	(C. A.)	118
Chetti *v.* Chetti		67
Claverley (Vicar of) *v.* Claverley (Parishioners of)		195
———————, Gatacre *v.*		195
Clutha Boat 147, The		36
Cordelia, The		27
Corinthian, The	(C. A.)	260
Craigellachie, The		1

D.

Davison *v.* Davison		308
Draupner, The	(C. A.)	219
Dunbar *v.* Dunbar		90

E.

		PAGE
El Argentino		236

F.

Fay *v.* Society of Notaries for State of Victoria		15

G.

Gatacre *v.* Claverley (Vicar of)		195
Gere, The		287
Gill *v.* Gill		157

H.

Hailstone, In re. Hopkinson *v.* Carter	(C. A.)	118
Harper, In the Estate of		88
Harriman *v.* Harriman	(C. A.)	123
Henly, Oxford (Bishop) *v.*		319
Hopkinson *v.* Carter. In re Hailstone	(C. A.)	118

J.

Joseph (otherwise King) *v.* Joseph		217

L.

PAGE

London County Council, St. Margaret, Lothbury (Rector and Churchwardens of) *v.* 310

M.

Mackenzie, In the Estate of 305

N.

Nador, The 300

O.

Oxford (Bishop) *v.* Henly 319

P.

Prince Leopold de Belgique, The 103

R.

Royle *v.* Royle 24

S.

St. John the Evangelist, Clevedon (Vicar and Churchwardens of) *v.* All Having Interest 6

PAGE

St. Margaret, Lothbury (Rector and Churchwardens of) *v.* London County Council 310

St. Paul, The (C. A.) 43

St. Paul, Bow Common (Vicar and Churchwardens) *v.* Inhabitants of Same 245

Saker, In the Estate of 233

Schwan, The (C. A.) 93

Seymolicus, The 109

Sharpe *v.* Sharpe 20

Sheila, The 31, n.

Society of Notaries for State of Victoria, Fay *v.* 15

T.

Tryst, The 333

V.

Victoria (Society of Notaries for State of), Fay *v.* 15

Vivian (Lord) *v.* Vivian (Lady) (C. A.) 57

W.

Walker, In the Estate of 115

Y.

Yarmouth, The 293

TABLE OF CASES CITED.

A.

		PAGE
Albano, The	[1907] A. C. 193	335
Alexander *v.* Simms	23 L. J. (Ch.) 721	242
Alison's Case	L. R. 9 Ch. 1	135
Annot Lyle, The	11 P. D. 114	165
Anselm, The	[1907] P. 151	268
Ardan Steamship Company *v.* Andrew Weir & Co.	[1905] A. C. 501	33
Ardaseer Cursetjee *v.* Perozeboye	10 Moo. P. C. 375	71
Armytage *v.* Armytage	[1898] P. 178	72

B.

Bailleau *v.* Victorian Society of Notaries	[1904] P. 180	18
Barque Quilpué, Ld. *v.* Brown	[1904] 2 K. B. 264	31
Barsham (Rector of) *v.* Parishioners of Same	[1896] P. 256	11, 255
Bellanoch, The	[1907] A. C. 269	260
Bernstein *v.* Bernstein	[1893] P. 292	193
Bethell *v.* Hildyard	38 Ch. D. 220	68
Bland *v.* Bland	L. R. 1 P. & M. 237	126
Blue Bell, The	[1895] P. 242	36
Bradshaw *v.* Bradshaw	[1897] P. 24	136
Bristow *v.* Whitmore	9 H. L. C. 391	240
Brook *v.* Brook	9 H. L. C. 193	69
Butler *v.* Butler	[1894] P. 25	130
Buxton *v.* Bateman	1 Sid. 201	214
Bywell Castle, The	4 P. D. 219	274

C.

Circe, The	[1906] P. 1	180
City of Berlin, The	[1908] P. 110	271
City of Lincoln, The	15 P. D. 15	180
Clifton *v.* Ridsdale	1 P. D. 316	250
Clyde Navigation Company *v.* Barclay	1 App. Cas. 790	165
Clyde Shipping Company *v.* Miller	9 F. 1145	165
Constantinidi *v.* Constantinidi	[1905] P. 253	60
Cooke's Trusts, In re	56 L. J. (Ch.) 637	69
Corven *v.* Pym	12 Rep. 106	212
Crisp *v.* Martin	2 P. D. 15	214
Culgoa, The	*Shipping Gazette*, April 28, 1894	303

D.

		PAGE
Davies *v.* Mann	10 M. & W. 546	48
Diamond, The	[1906] P. 282	297
Dodd *v.* Dodd	[1906] P. 189	123
Dormer *v.* Ward	[1901] P. 20	21
Duke of Buccleuch, The	[1891] A. C. 310	260

E.

Eady *v.* Elsdon	[1901] 2 K. B. 460	162
Elphinstone *v.* Purchas	L. R. 3 A. & E. 66	14

F.

Failes *v.* Failes	[1906] P. 326	123
Fanny M. Carvill, The	13 App. Cas. 455, n.	260
Fenham, The	L. R. 3 P. C. 212	48
Feronia, The	L. R. 2 A. & E. 65	243
Finney *v.* Finney	L. R. 1 P. & M. 483	133
Fitzgerald *v.* Fitzgerald	L. R. 1 P. & M. 694	136
Ford *v.* Stier	[1896] P. 1	68
Fuller *v.* Lane	2 Add. 419	204

G.

Gibson *v.* Gibson	29 L. J. (P. & M.) 25	128
Goatly *v.* Jones	[1907] W. N. 161	162
Goodman's Trusts, In re	14 Ch. D. 619; 17 Ch. D. 266	71
Graham *v.* Smart	9 Jur. (N.S.) 387	18
Grant *v.* Norway	10 C. B. 665	225
Great Bardfield (Vicar and Churchwardens) *v.* All Having Interest	[1897] P. 185	255
Green *v.* Briggs	17 L. J. (Ch.) 323	242
Groves *v.* Hornsey (Rector of)	1 Consist. 188	213

H.

Harris *v.* Dreesman	23 L. J. (Ex.) 210	33
Haswell *v.* Haswell	1 Sw. & Tr. 502	144
Hedley *v.* Pinkney & Sons Steamship Company	[1894] A. C. 222	99
Highgate, The	6 Asp. M. L. C. 512	3
Hopper No. 66, The	[1908] A. C. 126	297
Howarth *v.* Howarth	9 P. D. 218	130
Hughes *v.* Edwards	2 P. D. 361	10
Hyde *v.* Hyde	L. R. 1 P. & M. 130	68
Hyman *v.* Hyman	[1904] P. 403	189

I.

Indus, The	12 P. D. 46	165
Iveson *v.* Harris	7 Ves. 251	191

J.

Judd *v.* Judd	[1907] P. 241	129

K.

		PAGE
Keith *v.* Burrows	2 App. Cas. 636	241
Kenrick *v.* Taylor	1 Wils. 326	214
Kirby, In the Goods of	[1902] P. 188	307
Kirby Hall, The	8 P. D. 71	48
Krüger & Co. *v.* Moel Tryvan Ship Company	[1907] 1 K. B. 809 ; [1907] – A. C. 272	225

L.

Lawson *v.* Burness	1 H. & C. 396	31
Leduc *v.* Ward	20 Q. B. D. 475	227
Levy *v.* Levy	21 Times L. R. 157	125
London County Council *v.* Dundas	[1904] P. 1	312

M.

Manchester Trust *v.* Furness	[1895] 2 Q. B. 539	226
Mann, Macneal & Co. *v.* Ellerman Lines	7 F. 213	165
Margaret, The	9 App. Cas. 873	48
Markham *v.* Shirebrook (Churchwardens of)	[1906] P. 239	14
Martin *v.* Mackonochie	L. R. 2 P. C. 365	249
Meiklereid *v.* West	1 Q. B. D. 428	297
Mercantile Bank *v.* Gladstone	L. R. 3 Ex. 233	227
Mette *v.* Mette	1 Sw. & Tr. 416	69
Milanese, The	4 Asp. M. L. C. 318, 438	48
Mills *v.* Milward	15 P. D. 20	157
Muirhead, Ex parte	2 Ch. D. 22	190

N.

N. Strong, The	[1892] P. 105	43
Normandie, The	43 Fed. Rep. 936	48
Nott *v.* Nott	L. R. 1 P. & M. 251	128

O.

Ogden *v.* Ogden	[1907] P. 107; [1908] P. 46	69
Orienta, The	[1894] P. 271 ; [1895] P. 49	244
Oxford (Bishop) *v.* Henly	[1907] P. 88	320

P.

Pacific, The	Br. & L. 243	242
Paignton (Vicar and Churchwardens of) *v.* All Having Interest	[1905] P. 111	11, 254
Parkinson *v.* Parkinson	L. R. 2 P. & M. 25	128
Paton, In the Goods of	[1901] P. 188	89
Patterson *v.* Patterson	L. R. 2 P. & M. 189	190
Peirson *v.* Gell	Rothery, Return of Cases before the Delegates, p. 85, No. 171	10, 207

		PAGE
Pettman *v.* Bridger	1 Phillim. 316	212
Phillpotts *v.* Boyd	L. R. 6 P. C. 435	11, 250
Priscilla, The	L. R. 3 A. & E. 125	179
Pritchard *v.* Pritchard	L. R. 2 P. & M. 53	190
Prole *v.* Soady	L. R. 3 Ch. 220	190

Q.

Queen, The	L. R. 2 A. & E. 354	336

R.

Ranza, The	*Shipping Gazette*, Dec. 13, 1898	3
Red Rose, The	L. R. 2 A. & E. 80	243
Reg. *v.* Leresche	[1891] 2 Q. B. 418	128
Russell *v.* Russell	[1897] A. C. 395	127

S.

St. Albans (Bishop) *v.* Fillingham	[1906] P. 163	330
St. Anselm, Pinner, In re	[1901] P. 202	10
St. Barnabas, Pimlico (Vicar and Churchwardens) *v.* Bowron	Tristram's Consistory Judgments, p. 1	255
St. John the Baptist, Timberhill (Vicar and Churchwardens of) *v.* Rectors of Same	[1895] P. 71	10, 255
St. John the Evangelist, Clevedon (Vicar and Churchwardens) *v.* All Having Interest	[1909] P. 6	255
Sans Pareil, The	[1900] P. 267	48
Seaward *v.* Paterson	[1897] 1 Ch. 545	191
Sheila, The	[1909] P. 31, n.	31
Sickert *v.* Sickert	[1899] P. 278	135
Simonin *v.* Mallac	2 Sw. & Tr. 67	69
Smith *v.* Smith	[1905] P. 249	123
—— *v.* ——	3 Hagg. 757	207
Sottomayor *v.* De Barros	3 P. D. 1; 5 P. D. 94	69
Spirit of the Ocean, The	Br. & L. 336	297
Steel *v.* State Line Steamship Company	3 App. Cas. 72	101
Sugden *v.* St. Leonards (Lord)	1 P. D. 154	162
Sussex, The	[1904] P. 236	336
Sweet *v.* Ely (Bishop)	[1902] 2 Ch. 508	130

T.

Tanner *v.* Phillips	42 L. J. (Ch.) 125	240
Tasmania, The	14 P. D. 53	3
Thomson *v.* Thomson	[1896] P. 263	61
Thornton, In the Goods of	14 P. D. 82	307
Troubadour, The	L. R. 1 A. & E. 302	242
Tunbridge *v.* Mathews	[1903] W. N. 158	18
Tweedsdale, The	14 P. D. 164	2
Two Ellens, The	L. R. 4 P. C. 161	242

U.

		PAGE
Upton Castle, The	[1906] P. 147	4

V.

Vera Cruz (No. 2), The	9 P. D. 96	180
Victoria, The	3 W. Rob. 49	48

W.

Waddell *v.* Waddell	[1892] P. 226	190
Walter *v.* Gunner	1 Consist. 314	213
Ward *v.* Ward	1 Sw. & Tr. 185	146
Waring, Ex parte	19 Ves. 345	237
Westerton *v.* Liddell	Moore's Special Report, p. 155	248
Wheeler *v.* Wheeler	14 P. D. 154	60
White *v.* Bowron	L. R. 4 A. & E. 207	255
Wood *v.* Wood	14 P. D. 157	218
Woodford, The	*Shipping Gazette*, Mar. 13, 1905	165

CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

THE CRAIGELLACHIE.

1908
May 28.

Admiralty— Ship — Collision — Sailing Vessel—Steam Trawler — Duty of Steam Vessel to keep clear—Regulations for Preventing Collisions at Sea, 1897, *arts.* 9, 20.

A steam trawler fishing in the North Sea, with her trawl down over her starboard quarter, and exhibiting a black ball to indicate how she was engaged, was making from two and a half to three knots on a N.N.E. course, when she came into collision with a small sailing vessel which was making about six knots, and heading S.W. close hauled on the starboard tack. Those in charge of the trawler seeing the sailing vessel heading for them thought that she wished to speak them, and, when they realized that this was not so, it was too late to do anything. The sailing vessel, owing to having no look-out, failed to observe the trawler until close to:—

Held that, though the sailing vessel was to blame for having no look-out, the steam trawler was also to blame, for she might, by a small alteration of her course, have avoided the collision, and should, therefore,

1908

THE CRAIGELLACHIE.

have acted under art. 20 of the regulations for preventing collisions at sea, by which a steam vessel must keep out of the way of a sailing vessel.

The Tweedsdale, (1889) 14 P. D. 164, held not applicable.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the late fishing vessel *Maggie Cormack*, and the master and crew thereof proceeding for their lost effects. The defendants were the owners of the steam trawler *Craigellachie*.

The case involved the consideration of arts. 9 and 20 of the regulations for preventing collisions at sea, 1897. (1)

On June 25, 1907, about 7.30 A.M., the weather being fine and clear, with a strong north-westerly breeze, and the tide ebb of little or no force, the *Maggie Cormack*, of the port of Berwick, a sailing fishing vessel of 31 tons register, rigged as a keel boat, and carrying seven hands, was in the North Sea some thirty miles north-east of the river Tyne in the course of a voyage from the fishing grounds to Shields with a small catch of fish. She was under double-reefed mainsail and single-reefed foresail, and, being close hauled on the starboard tack, she was heading to the south-west, and making about six knots, when she came into collision with the steam trawler *Craigellachie*, of 111 tons gross register, engines of 110 indicated horse-power, and a crew of eight hands, with her trawl down on the starboard quarter, heading about north-north-east, and making from two and a half to three knots. She was carrying a black ball on her forestay to indicate that she was fishing.

Owing to there being no look-out on the sailing vessel, the trawler was not observed until she was close to, and the trawler with her stem struck the sailing vessel on the port bow, the result being that the sailing vessel (the *Maggie Cormack*) sank, and,

(1) Art. 9 (which came into force on May 1, 1906): "(*k*) All vessels or boats fishing with nets or lines or trawls, when under way, shall in daytime indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen . . . ."

Art. 20: "When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

1908

THE CRAIGELLACHIE.

with her cargo of fish and crews' effects, was totally lost, whilst the *Craigellachie* sustained considerable damage forward.

Those in charge of the trawler had noticed the *Maggie Cormack* when about a quarter of a mile distant and two points on the starboard bow, and, as she was heading for them, it was thought that she intended to speak the *Craigellachie*, and the whistle lanyard was pulled and broke. When it was realized that the sailing vessel was holding on but was not going to speak nothing could be done to avoid the collision.

Each vessel charged the other with failing to keep out of the way; but, as the *Maggie Cormack* was to blame for having no look-out, the question for the learned judge, who was assisted by two of the Elder Brethren of the Trinity House, resolved itself into whether the *Craigellachie*, though at the time engaged in trawling, was also to blame for not keeping out of the way of the sailing vessel.

Aspinall, K.C., and *Hugh C. S. Dumas*, for the plaintiffs, the owners of the *Maggie Cormack* and others. Under art. 20 of the regulations for preventing collisions at sea, it is the duty of a steam vessel to keep out of the way of a sailing vessel. This the *Craigellachie* failed to do, and she is, therefore, to blame. The correlative duty on the sailing vessel is, by art. 21, to keep her course and speed, and this the *Maggie Cormack* did, and therefore it is not material, for present purposes, that she had no look-out, as that was not the cause of the collision. The rule (art. 26) that sailing vessels shall keep out of the way of vessels fishing only applies to their meeting sailing vessels so engaged, and, assuming it to be a fact that those in charge of the steam trawler thought that the sailing vessel was going to speak them, that will not excuse a breach of the rule to keep out of the way. In *The Highgate* (1), distinguishing *The Tasmania* (2), it was held that the fact that a steam vessel is neglecting to keep out of the way of a sailing vessel does not make it the duty of the sailing vessel to take measures to avoid a collision, except in very exceptional circumstances: *The Ranza* (3); because it is

(1) (1890) 6 Asp. M. L. C. 512. (2) (1889) 14 P. D. 53.
(3) *Ship Gaz.*, Dec. 13, 1898.

1908

THE CRAIGELLACHIE.

possible for a steam vessel to act for a sailing vessel up to almost the last moment, and any action on the part of the sailing vessel might increase the risk of collision.

Lauriston Batten, K.C., and *A. D. Bateson*, for the defendants, the owners of the *Craigellachie*. The sailing vessel is to blame for neglecting to keep a proper look-out: art. 29 of the regulations for preventing collisions at sea. If she had had a look-out she would have kept out of the way, as those in charge would have seen that the trawler was exhibiting a black ball to indicate that she was fishing and that she was hampered by her trawl. On the other hand, the trawler was right in keeping her course and speed: see *The Tweedsdale* (1), which was followed in *The Upton Castle* (2), though the decision in the latter case was the other way, because, at the critical time, the trawler had got in her trawl. The law laid down in *The Tweedsdale* (1) still holds good, although that case was decided under the old regulations, for it was not interfered with when under the consideration of the committee appointed by the Board of Trade in 1897 (3), and the reasoning in that case is not affected by any of the provisions in the new art. 9, specially relating to fishing vessels, and which came into force on May 1, 1906. It is also to be observed that, as the alteration of art. 22 of the regulations of 1884, by the addition of the note to art. 21 of the existing regulations, makes it incumbent on the sailing vessel to act when collision cannot be avoided by the giving-way vessel alone, it is at least doubtful whether *The Highgate* (4) can be any longer considered as a binding authority—in other words, the provisions of art. 26, though in terms only applicable to sailing vessels, in effect would apply to a sailing vessel keeping out of the way of a steam trawler incumbered with her trawl.

Aspinall, K.C., in reply. The case of *The Tweedsdale* (1) is not applicable, as it was decided on the special circumstances which brought the trawler within art. 23 of the old regulations of 1884. In this case the trawler was not so incumbered as to

(1) 14 P. D. 164.
(2) [1906] P. 147.
(3) See the notes to arts. 9 and 20 in Stuart Moore's Rules of the Road at Sea, 3rd ed. (1900), pp. 27 and 49.
(4) 6 Asp. M. L. C. 512.

be unable to get out of the way of the sailing vessel, and, at the speed she was going, could easily have done so.

BUCKNILL J. It seems to me that in this case both vessels are to blame. In the first place, the sailing vessel had no look-out of any sort or kind, and she was going at a rapid speed on the starboard tack. Not having any look-out was a distinct breach of the regulations, and a breach which materially contributed to the collision. Therefore the sailing vessel is to blame.

With regard to the trawler, she had her signal ball up, which was a very proper indication to the other ship that she was trawling. She was moving at between two and a half and three knots an hour, or thereabouts. I find as a fact that she could, by porting her helm, have avoided this collision but for the contributory negligence on the part of the sailing ship. She was not, therefore, so handicapped that she could not obey the obligations which are cast upon steamships to get out of the way of sailing ships. The man on board the steam trawler thought the sailing ship was coming down to speak to him. He was wrong. He speculated, and because he speculated, and thought she was coming down to speak him, he took no steps as he ought to have taken, by porting his helm and coming up, as he might have easily done, and so have avoided the collision.

The cases which have been cited do not seem to me to carry the matter so far as the learned counsel who has adduced them and cited them think they do. I have nothing to do with the history of the regulations. They are international. We all know what an enormous amount of time was expended on their preparation, and they have been settled as international regulations. It is not for the Court to state what it thinks is the reason which led to the preparation of these rules. It is for the Court to construe them. It simply comes to this:—The steamer, being a steamer, has got to get out of the way of the sailing vessel, if they are proceeding in a direction so as to involve risk of collision. I do not think the case of *The Tweedsdale* (1) has anything to do with it. I do not think that the case which Bargrave Deane J. decided—*The Upton Castle* (2)—has

(1) 14 P. D. 164. (2) [1906] P. 147.

1908

THE CRAIGELLACHIE.

Bucknill J.

anything to do with it. I decide this case upon the facts, coupled with the regulations. I say that where a steamship and a sailing ship are so proceeding so as to involve risk of collision, the steamer must get out of the way of the sailing ship if she can. I find that the *Craigellachie* never got out of the way. The duty of the steamship to keep out of the way of the sailing ship was not complied with, and therefore my judgment is that both vessels are to blame.

Solicitors for plaintiffs, owners of the *Maggie Cormack* and others: *Pritchard & Sons.*

Solicitors for defendants, owners of the *Craigellachie: Williamson, Hill & Co., for R. & R. F. Kidd, North Shields.*

T. L. M.

1908

Oct. 23.

[IN THE CONSISTORY COURT OF BATH AND WELLS.]

THE VICAR AND CHURCHWARDENS OF ST. JOHN THE EVANGELIST, CLEVEDON *v.* ALL HAVING INTEREST.

Ecclesiastical Law—Faculty—Refusal of Faculty for Crucifix and Figures of St. John and the Virgin Mary upon Rood Beam—Discretion—Refusal of Faculty for Alterations to facilitate use of Church Bell as Sanctus Bell—Illegality of use of Church Bell for that Purpose.

The vicar and churchwardens of a parish church in the diocese of Bath and Wells petitioned the ordinary for a faculty for, amongst other alterations in the church, the erection of a carved oaken beam across the chancel arch to be surmounted by a crucifix and the figures of St. John and the Virgin Mary, and also for certain structural alterations so that one of the church bells might be rung from the interior of the church. It appeared in evidence that no exceptional services were held in the church, but that ornaments of the minister other than surplices were worn by the officiating clergy in the Communion Service; that the sacrament was reserved to take to the sick; that there was a crucifix in the vestry and also one in the church; and that one of the church bells was rung from the belfry or tower of the church at certain moments in the Communion Service as a sanctus bell. It further appeared that the vicar of the parish intended that the proposed crucifix upon the rood beam with its attendant figures should be an aid to devotion and a defence against erroneous teaching, and that

1908

ST. JOHN THE EVANGELIST, CLEVEDON (VICAR AND CHURCHWARDENS) *v.* ALL HAVING INTEREST.

the main object of the proposed alteration in respect of one of the church bells was that the bell might be rung from the interior of the church during the celebration of the Holy Communion.

The Chancellor of the diocese of Bath and Wells refused in his discretion to grant a faculty for the erection of the crucifix and its attendant figures upon the rood beam, being of opinion that the erection was not contemplated simply and purely as a matter of decoration.

He also refused to sanction by faculty the alterations proposed to enable one of the church bells to be used from the interior of the church as a sanctus bell.

The tolling or ringing of one of the church bells of a parish church during the consecration prayer in the Communion Service at the moment of the elevation of each of the sacred elements as a sanctus bell is illegal.

THIS was a cause of faculty promoted by the Reverend Harold Thomas Adams, vicar of the parish and parish church of St. John the Evangelist, Clevedon, in the county of Somerset and diocese of Bath and Wells, and Herbert Radcliffe and Charles William Purnell, churchwardens of the same parish, for the purpose of obtaining a faculty for certain works to be executed in the parish church aforesaid, including the following:—

The removal of the present heavy stone cross and decoration above the chancel arch, with the erection of the former, if found suitable, in the east wall outside the church, and the erection in its stead of a carved oak beam surmounted by a crucifix with the figures of St. John and the Virgin Mary.

The carrying a connection, if found practicable, at a lower level under the existing pitched roof into the churchyard, enabling one of the bells to be rung from inside the church.

The citation was duly served by a copy thereof being affixed on the principal door of St. John the Evangelist, Clevedon, by the promovent, the vicar, on August 30 last, the same remaining there until September 6 last, but no appearance was entered for any opponent.

The suit was now heard before the Chancellor of the diocese of Bath and Wells (C. E. H. Chadwyck-Healey, Esquire, K.C.).

The promovents all gave evidence in support of the petition. The vicar stated in his evidence in effect that there were no exceptional services in St. John's Church, no services on Palm

1908

ST. JOHN THE EVANGELIST, CLEVEDON (VICAR AND CHURCHWARDENS) *v.* ALL HAVING INTEREST.

Sundays except the Prayer Book services, and on Corpus Christi Day no marked observance, except that the colour of the day was white; that the sacrament was reserved to take to the sick; that there was a crucifix in the vestry, and also one in the church hanging against a pillar near where confessions were heard; that in the Communion Service the elements were elevated, but not towards the people, and that "the vestments" were used, i.e., ornaments of the minister other than surplices were worn by the officiating clergy in the Communion Service. He also gave evidence that it was proposed to carry a connection to bring the bell rope of one of the church bells inside the church, instead of having to go to the belfry or the entrance porch of the church in order to ring it, the main object of the alteration being that the bell so to be rung from the interior of the church might be rung during the celebration of the Holy Communion, and that one of the church bells was at present rung from the belfry or entrance porch of the church for funerals, for various services, and in the Communion Service at the time of the consecration of both elements at the elevation of each.

The result of the remainder of the evidence appears from the judgment.

The promovent, the vicar in person, moved the faculty.

No opponent appeared.

THE CHANCELLOR. I do not think that I need reserve judgment in this case. I am much obliged to Mr. Adams for his argument; it has been of assistance to the Court. It is proposed to carry out additional works of construction in St. John the Evangelist's Church, Clevedon, the application for a faculty for all of which has been unanimously approved by the vestry of the parish, and the details of which are set out in the citation. As regards all the alterations other than two alterations in respect of which I have heard argument, and to which I will again refer, I see no reason why they should not be sanctioned by a faculty and carried out. [The Chancellor read from the citation several of the constructional details which it was proposed to have carried out and as to which no question arose, and

1908

ST. JOHN THE EVANGELIST, CLEVEDON (VICAR AND CHURCHWARDENS) *v.* ALL HAVING INTEREST.

The Chancellor.

continued:—] It is also proposed to remove the present heavy stone cross and decoration above the chancel arch and to re-erect the former, if found suitable, in the east wall outside the church, and to erect in its stead a carved oak beam. Now as to all these matters as to which I have not thought it necessary to hear argument I am satisfied with the case made out on behalf of the petitioners, and that they are necessary and proper, and so far as they are concerned a faculty may issue. Then as to another matter which is proposed, namely, the removal of the altar temporarily, if found necessary, to the nave for the continuance of service during the work of restoration, the faculty may extend to that, proper care and reverence being taken in the removal of the altar. [The Chancellor then referred to three other matters not referred to in argument and, after observing that they might be sanctioned by the faculty, proceeded:—] Two questions only remain, the question of the rood beam with the figures upon it and the question as to the alteration with regard to one of the church bells to carry a connection, if found practicable, at a lower level under the existing pitched roof into the church, enabling the bell to be rung from inside the church. In dealing with these two points—the two points as to which I have heard argument—I wish it to be quite understood that I am not importing into the questions at issue any personal views or feelings of my own. I have no right at all to do that. I have simply to decide according to law, to interpret to the best of my ability the authorities that are binding upon me, and to consider the decisions of Courts of co-ordinate jurisdiction which, though not binding upon me, are entitled to the respect which one Court properly pays to the decisions of another. I say this because it is very frequently thought that the personal opinions of a Chancellor of a diocese may to some extent be permitted to influence his decision. This is a great mistake. He who occupies the position of a judge is obliged to proceed judicially and to disregard any personal views.

To take the two subjects I have referred to in the order in which they have been opened, the more difficult of the two is the question of the crucifix and its attendant figures

1908

ST. JOHN THE EVANGELIST, CLEVEDON (VICAR AND CHURCHWARDENS) *v.* ALL HAVING INTEREST.

The Chancellor.

upon the chancel beam. It is a very difficult question, and the law with respect to it is not altogether in a satisfactory position. I take it that the law as it stands may be put in this way. If the erection of a rood is likely to lead to superstitious practices, then it ought not to be allowed, but if the erection of a rood is simply part of a scheme of decoration and is not open to superstitious use, it may be allowed. But there is a third question, namely, Can the erection of a rood without more (by the erection of a rood I mean of course the representation of our Lord crucified, with the attendant figures) in this position in a church be considered to be decorative only? This question has given rise to a difference of judicial opinion and cannot be considered as settled. Mr. Adams has referred, and properly referred, to some of the leading cases. I need not dwell upon the arguments based upon the erection of the window in St. Margaret's Church, Westminster (1), or upon the decision in *Hughes* v. *Edwards* (2), the Denbigh reredos case. The case of a reredos is not like the case of a rood. To use the words of Lord Penzance, "the probability of abuse therefore rests entirely on the character and position in the church of the thing itself": *Hughes* v. *Edwards*. (3) I pass on to consider briefly the authorities to which reference has been made dealing with the erection of the rood upon a screen or beam.

In the Pinner case, *In re St. Anselm, Pinner* (4), what was proposed, as I pointed out during the argument in this case, and what was allowed, was regarded as merely an architectural decoration, but it is important to note that Sir Arthur Charles was careful to observe that the position of the group the subject of his consideration, "though on the chancel screen," was "by no means identical with the position occupied before the Reformation by the rood," and, moreover, there was nothing in the nature of a rood loft or rood beam: *In re St. Anselm, Pinner*. (5) In *The Vicar and Churchwardens of St. John the Baptist, Timberhill* v. *The Rectors, &c. of the Same* (6) the Chancellor of the diocese of

(1) See *Peirson* v. *Gell*, (1762) Rothery, Return of Cases before the Delegates, p. 85, No. 171.
(2) (1877) 2 P. D. 361.
(3) 2 P. D. 361, at p. 369.
(4) [1901] P. 202.
(5) Ibid. at p. 220.
(6) [1895] P. 71.

1908

ST. JOHN THE EVANGELIST, CLEVEDON (VICAR AND CHURCHWARDENS) *v.* ALL HAVING INTEREST.

The Chancellor.

Norwich refused a confirmatory faculty for the retention of the rood then recently erected in that church on a beam above the rood loft. It is true that there was evidence of the holding of a special Palm Sunday service, but, as the learned Chancellor observed in his judgment in the later case of *The Rector, &c. of Barsham* v. *The Parishioners of the Same* (1), in giving his earlier decision he had held that to erect a rood now, after the interval of three centuries, of exactly the old pattern, in exactly the same position as before, and for no purpose arising out of the authorized services of the Church, was ipso facto likely to cause abuse. In the *Barsham Case* (2) a faculty was allowed, not, I gather, without hesitation.

There is a passage in the judgment of Lord Penzance in *Clifton* v. *Ridsdale* (3) which seems to me to be applicable to this case. Lord Penzance observes: "It is no doubt easy to say, What proof is there of danger of idolatry now? What facts are there to point to a probability of 'abuse'? But when the Court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation in a particular part of the church and for the particular purpose of 'adoration'—when the Court finds that the same object both in the church and out of it is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that now, after the lapse of three hundred years, it is suddenly proposed to set up again this same object in the same part of the church as an architectural ornament only, it is hard not to distrust the uses to which it may come to be put or escape the apprehension that what begins in 'decoration' may end in 'idolatry.' If this apprehension is a just and reasonable one, then there exists that likelihood and danger of 'superstitious reverence' which the Privy Council in *Phillpotts* v. *Boyd* (4) pronounced to be fatal to the lawfulness of all images and figures set up in a church."

In the Paignton case, *The Vicar and Churchwardens of Paignton* v. *All having Interest* (5), a judgment of my own, sitting in the

(1) [1896] P. 256, at p. 261.
(2) Ibid. at pp. 262, 263.
(3) (1876) 1 P. D. 316, at p. 356.
(4) (1875) L. R. 6 P. C. 435.
(5) [1905] P. 111.

1908

ST. JOHN THE EVANGELIST, CLEVEDON (VICAR AND CHURCHWARDENS) *v.* ALL HAVING INTEREST.

The Chancellor.

Consistory Court of Exeter, I had occasion to consider all the authorities bearing upon this particular matter, and I came to the conclusion, rightly or wrongly, that there the erection of a rood under somewhat special circumstances could not be allowed. There were no unauthorized services performed in that church, but I considered that, if a rood were introduced in the way it was then asked, there was absolutely nothing to prevent an application from every parish church in the country for its re-erection, and I see no reason in this case, if it be erected in St. John the Evangelist's Church, Clevedon, why it should not be legitimate for every parish church in England. It was pressed upon me in argument that if the ornament for which a faculty is now prayed were allowed, and hereafter it were shewn that it had become open to superstitious use, it might be ordered to be removed. That is an argument to which the Court cannot accede.

Mr. Adams further put forward with perfect and commendable frankness as a good reason why the rood should be erected in the church that it would be an aid to devotion. He said that it would be an aid to devotion, and it also would be a factor against teaching such as "Faith Healing" and "Christian Science," so that it is plain to my mind in this case that the erection of the rood upon its beam is not contemplated purely and simply as a mere matter of decoration. Here again I may refer to the judgment of Lord Penzance in *Clifton* v. *Ridsdale.* (1) "Is it really so absurd," Lord Penzance said, "as it was argued to be, to imagine that at the present day the worship of lifeless images and figures, not as idols, perhaps, but as aids to devotion, should again prevail as in old times? The fear that it should be so may be unfounded, but I question whether intellectual culture can be relied upon as a safeguard against it; for if so, what is to be said of the Romish Church and of those able and distinguished men who in our own day have not hesitated to join and accept its doctrines. What I am here discussing, I must again repeat, is not the belief in an idol of wood or stone, but the practice of involving in devotional exercises outward and visible forms as inculcated in the devotional books of the Roman Catholic creed. This is the 'fond thing vainly invented' of the twenty-second Article

(1) 1 P. D. 316.

1908

ST. JOHN THE EVANGELIST, CLEVEDON (VICAR AND CHURCHWARDENS) *v.* ALL HAVING INTEREST.

The Chancellor.

of Religion; and the mere fact of the existence of such a doctrine in that Church, amongst whose members high intellectual power and acquirement is rife, is, to my mind, a conclusive answer to the suggestion that the intellect or knowledge of the present day may be relied upon to take the place of those safeguards which it was the work of the Reformation to establish. But another consideration must not be lost sight of. If the intelligent and the cultivated no longer need the protection of old days, can the same be said of the weak and ignorant? The parish church is for all—not for a class,—and if the crucifix placed as it is in this instance is lawful in St. Peter's Church, it is lawful for every parish church in the country and may be provided for every congregation—strong-minded or weak, instructed or ignorant. Let it be considered to what such a state of things as that would be likely to lead. If devotion to our Lord comes to be habitually paid immediately before a sculptured figure of His body on the cross, which arrests the eye and occupies the imagination whilst the mind is in attitude of prayer, it may be easy to some, and possible to many, but hardly possible to all, to wholly dissociate the outward object from the inward prayer and exclude it from playing any part in that devotion. The immediate presence before the eye of an outward form or object proffers an assistance, though of a spurious kind, towards fixing wavering thoughts and exalting religious fervour, which can hardly be rejected by those who most feel the want of it and to whom all abstract thought is a difficult exercise": *Clifton* v. *Ridsdale*. (1) In my judgment the passage which I have quoted has a strong bearing upon the case now under consideration.

I have pointed out that the law is in a very unsatisfactory position, and I hoped after deciding the *Paignton Case* (2) that the decision might have been taken to a superior Court. But it was not. I must therefore refuse a faculty for the erection of the rood on the chancel beam. If a cross were put there, as designed by the architect, it would not be open to objection, and for that I should have no hesitation in decreeing a faculty.

The only point I have now to decide is the question of the bell which it is desired to ring at celebrations of the Holy

(1) 1 P. D. 316, at pp. 356, 357. (2) [1905] P. 111.

1908

ST. JOHN THE EVANGELIST, CLEVEDON (VICAR AND CHURCHWARDENS) *v.* ALL HAVING INTEREST.

The Chancellor.

Communion. It is desired to effect certain structural alterations so that a bell rope may be brought from the tower of the church to the interior of the church itself, so that the bell can be rung from the interior of the church at certain moments in the Communion Service. The bell is tolled, or has been tolled, during the consecration prayer in the Communion Service, that is to say, at the moment of the elevation of each of the sacred elements. I am quite aware that the ringing of a bell at the time of the celebration of the Holy Communion is a matter of comfort to many people who cannot, either by reason of sickness or other causes, be present in church. I am also of course aware that the ringing of the sanctus or sacring bell was enjoined by early constitutions of our Church. I need only mention the Constitutions of Alexander, Bishop of Coventry, in 1237, 1 Wilkins' Concilia, p. 641; of Archbishop Peckham in 1281, 2 Wilkins' Concilia, p. 52; and of the Synod of Exeter in 1287, 2 Wilkins' Concilia, p. 132. But the use of the sanctus bell has been expressly decided to be unlawful by Sir Robert Phillimore, Dean of the Arches, in *Elphinstone* v. *Purchas* (1), and that decision is binding upon this Court. It is true that the bell the subject of that suit was a hand bell rung in the church, but I am unable to trace any distinction between such a bell sounded at the Altar and the use of one of the bells in the tower, rung at the like moments and for the like purpose.

The Court is asked to allow a faculty for alterations to be made to enable a bell in the tower to be used as a sanctus bell. I cannot accede to that part of the prayer in the petition. It follows, therefore, that on these two points the faculty must be refused, unless it is thought proper as to one of these points to substitute for the rood the cross as proposed by the architect. As to the rest of the improvement work a faculty may issue as prayed.

(1) (1870) L. R. 3 A. & E. 66, at p. 98. See *Markham* v. *The Churchwardens of Shirebrook*, [1906] P. 239, at pp. 241, 245, 261.

C. F. J.

MELBOURNE NOTARIES:

1908
Nov. 23.

[IN THE COURT OF FACULTIES.]

FAY *v.* THE SOCIETY OF NOTARIES FOR THE STATE OF VICTORIA.

In considering an application by a person to be appointed a notary public in a colonial district, the Master of the Faculties attaches great weight to the views of a society of notaries practising in the district. An appointment was, however, made for Melbourne, in the State of Victoria, notwithstanding the opposition of such a society, on very strong evidence that the applicant was personally suitable, and that the number of existing notaries at Melbourne was insufficient for the convenience of the public.

THIS was an application by Franklin Ethelbert Fay, of 95, Queen Street, in the city of Melbourne, in the State of Victoria, solicitor, to be appointed and admitted a notary public to practise at Melbourne aforesaid.

The applicant filed in the registry under date of June 3, 1908, a certificate of fitness signed by two of the notaries public practising at Melbourne, which stated that the applicant was well known and a person of known probity, sober life, and conversation conformable to the doctrine and discipline of the Church of England as by law established, and well affected to His Majesty King Edward and the present Constitution both in Church and State, and concluded as follows: "Wherefore we do conceive the said F. E. Fay to be a person fully qualified to be created a notary public." Notice was also given on his behalf to the Society of Notaries of Victoria of his application, and that a memorial embodying the terms thereof would be lodged in the registry within two months from November 26, 1907.

The memorial so lodged in the registry on behalf of the applicant stated in substance as follows:—

1. There are thirty-five notaries public practising in the city of Melbourne.

2. The nearest places to Melbourne at which there are notaries are Geelong, distant from Melbourne forty-five miles, and Kyneton, distant from Melbourne fifty-seven miles.

1908

FAY v. THE SOCIETY OF NOTARIES FOR THE STATE OF VICTORIA.

3. Melbourne is a city containing within a radius of ten miles from the General Post Office a population of 526,400. There are (irrespective of the Savings Bank and its branches) eleven banks of issue having 100 branches within the said radius and having advanced moneys in 1906 amounting to 31,495,558*l.* and having deposits amounting in 1906 to 36,660,514*l.* The ships entered at the port of Melbourne during 1906 numbered 2,044 with an aggregate tonnage of 3,857,142 tons. There are 382 solicitors practising in the city of Melbourne, and the services of a notary are in frequent request. The present number of notaries is insufficient for the due convenience and accommodation of the said city and the surrounding district, and considerable inconvenience is experienced for the want of other notaries.

The memorial concluded with an allegation that the applicant had been articled to a notary public and solicitor, was admitted a solicitor in May, 1888, and had practised at Melbourne since 1889, and a prayer that the Master of the Faculties would be pleased to appoint and admit him a notary public to practise at Melbourne aforesaid.

There were appended to the memorial of the applicant the signatures of eighty-one persons residing at Melbourne, who stated above their signatures that they were satisfied with the truth of the statements in the memorial and that the applicant was a fit and proper person to be appointed a notary public, and that they joined in the prayer thereof. The persons so countersigning the memorial of the applicant included one judge of the High Court of Victoria, one county court judge, the Premier of the State of Victoria, a member of the Parliament of Victoria, the Agent-General of Victoria in London, police magistrates and other officials at Melbourne, barristers and solicitors practising there, two bankers and seven bank managers, and over thirty firms of merchants.

The application was opposed by the Society of Notaries for the State of Victoria, and a memorial in opposition was filed on their behalf praying that the Master of the Faculties would be pleased to refuse the present application of the applicant, or in the alternative to postpone its consideration until the claims of prior applicants had been considered.

The memorial in opposition alleged that the statements of facts therein were brought before the Court and prayed in aid of the opposition of the Society of Notaries of Victoria to the immediate grant of a faculty to the applicant. Such statements in the first two paragraphs of the memorial were in substance that, admitting that there were thirty-five notaries then practising in the city of Melbourne, such number was more than sufficient for the due convenience and accommodation of the said city and the surrounding district, and it was inexpedient that such number should be exceeded; that notaries were practising in the same street and immediate neighbourhood of the applicant, and no complaints had been made to the memorialists of the insufficiency of notaries; and that since the constitution of the Commonwealth of Australia in the year 1900 there had been no abnormal increase in the population of Melbourne or in the banking or mercantile prosperity or trade generally, but that, on the contrary, its shipping trade had declined by reason of the smaller number of ships annually entering its port—for instance, in 1901 4756, in 1902 4564, and in 1906 only 2044 vessels were registered as entering the port.

In the remaining portion of the memorial in opposition the memorialists referred to two orders of the then Master of the Faculties. In one of these orders, made in 1859, it was directed that no future appointment for the then Colony (now the State) of Victoria should be made, unless it was shewn to be necessary by reason of the death, retirement, or removal of one of the existing notaries, or that the number of notaries was insufficient for the due convenience of the public. In the other order, a subsequent one, it was directed that as a condition precedent to the consideration of any future applications for grants of faculties notice should be given to the memorialists, who should then be at liberty to support such applications or oppose them; that a list in order of date of the intended applications of solicitors who desired to apply to become notaries was kept by the memorialists, and that there were many applicants on the list prior in date to the present applicant.

The applicant replied not admitting the truth of the statements contained in the memorial in opposition except so far as

1908

FAY v. THE SOCIETY OF NOTARIES FOR THE STATE OF VICTORIA.

they agreed with the statements contained in the memorial of the applicant.

The application now came on to be heard before the Master of the Faculties (Sir Lewis T. Dibdin, D.C.L.).

It appeared that at the date of the hearing the applicant had become first in order on the list of intended applicants for an appointment as notary kept by the Society of Notaries of Victoria and referred to in their memorial in opposition, and no prior applicant on that list stood in the way of his being appointed on the next vacancy in the existing number of thirty-five notaries.

Montague Barlow, for the applicant.

Guy Lushington, for the Society of Notaries of the State of Victoria.

[They referred to *Tunbridge* v. *Mathews and Others* (1), *Graham* v. *Smart* (2), and *Bailleau* v. *The Victorian Society of Notaries*. (3)]

THE MASTER OF THE FACULTIES. This case is of a kind which always gives great difficulty to me, the difficulty of deciding a pure question of fact at an enormous distance from the scene and on materials which, without using the word invidiously, are one-sided. The application of Mr. Fay to be appointed a notary public has the support of a very large and a very influential—quite an unusually influential—body of supporters, and they all commit themselves to the statement that the number of notaries public in Melbourne is insufficient for the due convenience and accommodation of the city of Melbourne and the surrounding district, and that considerable inconvenience is experienced from the want of additional notaries public. I have that on the side of creating further notaries public. On the other side I have a memorial of the Society of Notaries Public in Melbourne—the Society of Notaries for the State of Victoria—stating that there are quite sufficient notaries public for the business to be transacted in the city of Melbourne and

(1) [1903] W. N. 158. (2) (1863) 9 Jur. (N.S.) 387.
(3) [1904] P. 180.

the surrounding district, and that the number of ships entering the harbour has diminished rather than increased, so that the whole body of business requiring the assistance of notaries public is not greater than it was in 1904, when Mr. Bailleau was appointed. (1) I want to say at once that I attach great weight on questions of this kind to the view of the Society of Notaries concerned. The Court has again and again been assisted by notarial societies both in the colonies and in England, and I think it would be quite wrong to refuse to give great weight to the views of those societies. Of course they are in the nature of trade unions, and their interest is on the side of limiting the number of notaries. But they have always dealt with the questions which come before me in a way that shewed considerable public spirit, and I find their assistance of great value. Therefore I am not at all inclined to ride roughshod over the views of the Society of Notaries in Melbourne. I confess, however, I find it difficult to believe that the number of notaries public in Melbourne is very much below what the interests of business require. I think that if that were so we should hear of it, probably in the Faculty Office or through some other public channel, and it would become known. In Mr. Bailleau's case (1) I did not mean to say that the number of notaries public should be restricted to the number then in existence with the addition of the appointment I then made, and I do not say so now. I think an appointment should be made having regard to the evidence in this particular case. Mr. Fay must be appointed. I am bound to give weight to the evidence adduced in support of his application. But I desire to say with regard to the future that I do not encourage applications to augment the number of notaries public in Melbourne at the present time. I do not say that no appointment would be made—it would depend on the evidence—but the application would have to be very strongly supported, as Mr. Fay's application has been. But I desire to say that I do not encourage fresh applications, as I do not think there is any urgent need, for further appointments, and I wish that to be publicly known. Unless the application was supported very strongly indeed, the probability

(1) See *Bailleau* v. *The Victorian Society of Notaries*, [1904] P. 180.

1908

FAY v. THE SOCIETY OF NOTARIES FOR THE STATE OF VICTORIA.

is that I should not see my way to accede to it if the effect were to add to the number of Melbourne notaries public. In this case a faculty will be issued appointing Mr. Fay a notary public for the city of Melbourne and for the surrounding district—that is, for certain surrounding counties which will be specified in the grant.

Solicitors for applicant: *Lee, Ockerby & Everington.*

Solicitors for Victorian Society of Notaries: *Harwood & Pusey.*

C. F. J.

1908
Nov. 30.

SHARPE (OTHERWISE MORGAN) *v.* SHARPE.

Nullity—Variation of Settlement—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12)—*Form of Order.*

By indenture of settlement dated June 8, 1894, and made between the respondent, the petitioner, and trustees, the respondent, in consideration of the marriage then intended between himself and the petitioner, transferred to the trustees certain stocks, shares, and securities upon trust (inter alia) to pay the income arising therefrom to himself for life, then to the petitioner, if she should survive him, for her life, whether covert or discovert, without power of anticipation, and if there should be no child of the said intended marriage who should attain a vested interest, then in trust for the respondent absolutely.

The marriage having been annulled at the instance of the wife, she presented a petition to vary the settlement. The income of the wife, as found by the registrar, was 197*l.* and that of the husband 674*l.* per annum.

The Court ordered that the matter be referred to one of the conveyancing counsel of the Court to prepare a deed to provide for the placing in the hands of trustees (to be appointed) a sum, which the respondent was by this order directed to provide, sufficient to produce 100*l.* per annum; that this income be paid to the respondent; and that he be ordered to pay 100*l.* a year to the petitioner for her life dum sola vixerit.

THIS was a motion on behalf of the petitioner to confirm the report of the registrar upon a petition to vary the settlement made on the marriage which had been annulled.

There was also a cross-motion by the respondent that the petition for variation be dismissed, or, in the alternative, that

the settlement be declared null and void except as to such portion of the trust fund as might be sufficient to produce 100*l.* per annum, and that such sum be paid to the petitioner dum sola, and that upon the marriage of the petitioner the settlement be declared null and void.

The report of the registrar, dated November 9, 1908, was as follows :—

"1. This was a wife's petition for nullity on the ground of the incapacity of the respondent, and the decree nisi pronounced on the 16th January, 1908, was on the 27th July, 1908, made absolute.

"2. On the 3rd March, 1908, the petitioner filed a petition to vary an ante-nuptial indenture of settlement dated 8th June, 1894. Subsequently the parties appeared before me by their counsel. The trustees of the settlement have been served but have not appeared.

"3. By this deed the respondent transferred certain trust funds to the trustees upon trust for the respondent for life and then for the petitioner for life, with an absolute reversion to the respondent in the event of there being no issue of the marriage. The husband's income under the settlement may be taken at 274*l.* per annum. He has further income, outside the settlement, of 400*l.* per annum. The wife has 97*l.* per annum income from certain trust funds (not the subject of this settlement) together with a voluntary allowance of 100*l.* per annum which has been paid to her by her stepmother regularly since 1894.

"It is submitted that an order be made upon the trustees to pay out of the funds the subject of the settlement the sum of 100*l.* per annum to the petitioner for her life without deducting income tax."

J. Harvey Murphy, for the petitioner, moved to confirm the report of the registrar.

Bayford, for the respondent. The settlement became inoperative on the decree of nullity being pronounced, and there are no longer any trustees upon whom the suggested order can be made: *Dormer* v. *Ward*. (1) There is no authority for assessing

(1) [1901] P. 20, at p. 33.

1908

SHARPE v. SHARPE.

an allowance in such a case upon the same basis as after a decree of divorce, where the respondent is found guilty of a matrimonial offence. The proper course in such a case would be to apply under the new Act. (1)

[BARGRAVE DEANE J. You seem to have a good point, that there are now no trustees of the marriage settlement because that settlement has come to an end by the decree absolute for nullity.]

Then, as to the merits and quantum, the principle adopted by the registrar ought not to be the same as in cases of judicial separation or divorce. Although in cases of nullity, where the petitioner has nothing, it may be reasonable that the petitioner, although she has, of her own initiative, chosen to have the marriage, which was only voidable as in this instance, annulled, it is not right that she should, where she has sufficient means of her own, come and ask to have her income made up, at the expense of her husband, to fully one-third of their joint incomes. Upon the figures before the Court, this petition should be dismissed, or, at the utmost, 50*l.* a year should be ordered to be paid or secured. If any order is made in the petitioner's favour it should be limited dum sola.

[BARGRAVE DEANE J. Does the proviso contained in sub-s. (*a*) of the Act of 1907 apply to the whole of sub-s. 1, or only to the second part of that sub-section? It looks as if the Legislature, or those responsible for the framing of this Act, had tumbled over the provisions of the previous Matrimonial Causes Acts (2) dealing with these matters and had muddled them all up.]

J. Harvey Murphy, in reply. Dealing with the matter as if the application were made under the Act of 1907, the cross-notice of motion filed on behalf of the respondent amounts practically to an acceptance of the reasonableness of the figure of 100*l.* a year. The aggrieved party is to be placed, as far as may be, in the same pecuniary position as she would have enjoyed if the marriage had continued, and no distinction ought to be drawn between cases of nullity and cases of divorce. Part of the petitioner's income is derived from a voluntary allowance made to

(1) The Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1, sub-s. 1.

(2) 20 & 21 Vict. c. 85, s. 32; 29 & 30 Vict. c. 32, s. 1.

her by her stepmother, and there is no evidence that the petitioner will benefit at all on the death of her stepmother.

BARGRAVE DEANE J. The registrar's figure of 100*l.* is reasonable, and therefore, to that extent, I agree with him; but since the decision in *Dormer* v. *Ward* (1), and especially since the Act of last year, I think the proper procedure would have been to present a petition asking that the respondent in such a case as this should be ordered to secure the income to the petitioner for such time as might be considered reasonable.

In the present case I am of opinion that the respondent should be ordered to secure 100*l.* a year, and the case must go to one of the conveyancing counsel of the Court to do that. I think it will be necessary that there shall be trustees appointed under the deed, that the income shall be payable to the respondent, and then, the income being so payable to him, I make an order on him to pay that income to the petitioner.

Then comes the question, for what length of time should it be payable? In my opinion it should be for the life of the petitioner dum sola vixerit, because, if she marries again, there is no reason why the payment of this money should be continued to her. There is a difficulty in the Act of last year, an omission which I cannot supply. Supposing that the petitioner were to come into a substantial income hereafter, I think it only reasonable that the respondent should have liberty to apply. The Act, however, does not provide for this. It only says that if he cannot afford to pay he may apply. If this lady, by the death of her stepmother or any other relative, or from any other source, were to come into possession of a substantial increase of income, there is nothing in the Act to enable the respondent to apply to vary the order which has once been made. There ought to have been a provision for that in the Act when it was being framed.

I do not confirm the registrar's report, because he recommends that the trustees of the settlement should be ordered to pay the amount allotted. But, under the Matrimonial Causes Act, 1907, I direct that the matter be referred to one of the conveyancing

(1) [1901] P. 20, at p. 33.

1908

SHARPE v. SHARPE.

Bargrave Deane J.

counsel of the Court to prepare such a deed as shall put into the hands of trustees, to be thereunder appointed, a sum of money, to be provided by the respondent, sufficient to produce 100*l.* a year; that this income be paid in the first place to the respondent; and that there should be also an order that he pay 100*l.* a year to the petitioner during her life dum sola vixerit. This will enable the respondent to apply to vary the order, in case he should find himself unable to pay.

The petitioner is entitled to her costs.

Solicitors for petitioner: *Lewis & Lewis.*

Solicitors for respondent: *Frere, Cholmeley & Co.*

H. D. G.

1908

Nov. 19.

[DIVISIONAL COURT.]

ROYLE *v.* ROYLE.

Practice—Appeal—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Notes of Proceedings in Court below—Duties of Magistrates' and Justices' Clerks.*

Where upon the hearing of a summons under the Summary Jurisdiction (Married Women) Act, 1895, the clerk of the justices allows a shorthand note to be taken in place of the ordinary longhand note, he must certify the transcript of such note as correct, and cannot discharge his duty with regard to the making of the note unless he so certifies the transcript of the shorthand note which he allowed to be taken.

Unless the parties both agree to the taking of a shorthand note in place of the longhand note usually taken in such cases by the clerk to the justices, such longhand note must be taken, and in any event no extra expense must fall upon the parties in case either of them should require a transcript of the note for the purpose of an appeal.

On the facts proved, the wife was shewn to have been compelled to leave her husband under circumstances which, in law, amounted to desertion by him.

An agreement not to take any proceedings "for separation, or divorce, or maintenance," signed by the wife after the separation, held bad.

APPEAL from justices.

This was an appeal by William Royle from an order made by justices sitting at the Court of summary jurisdiction at Dale

Street, Liverpool, on August 19, 1908, granting the wife, Mary Royle, a separation and 12*s.* a week for her maintenance.

The grounds of the appeal were :—

1. That there was no evidence of desertion sufficient to support the said order.

2. That cohabitation was put an end to by the act of the wife, and contrary to the desire of the husband, without reasonable cause or excuse.

3. That, after cohabitation had ceased, the parties mutually agreed to live separate and apart from each other upon the terms and conditions contained in an agreement in writing bearing date the 22nd day of October, 1906, made under the hand of the wife, the conditions whereof were duly observed and performed, and cohabitation was never afterwards resumed.

4. That the said agreement compromised the claim of the wife in respect of desertion (if any), and ousted the jurisdiction of the Court making the said order, and that the said order is therefore bad in law.

The agreement, which was duly stamped as such, was in the terms following :—

"Liverpool, 22nd October, 1906.

"To Mr. William Royle.

"In consideration of your retiring from the trusts of the will of the late John Carrington, I hereby undertake that I will not take any proceedings against you for separation, or divorce, or maintenance.

"Mary Royle."

John Carrington was a son-in-law of the parties, who since about 1902 had made their home with Carrington's widow until September 28, 1908, when she removed her furniture in consequence of her father, William Royle (the present appellant), having been found a few days before to be carrying on an intrigue with another woman.

Mrs. Carrington allowed her mother, Mary Royle, to accompany her to and stay with her in the new home to which the furniture was removed.

On the hearing of the appeal the only notes before the Divisional Court were in the form of a transcript of a shorthand

1908

ROYLE v. ROYLE.

note, said to have been made under the authority of the clerk to the justices in the Court below.

The remarks made thereon by the President are embodied in the head-note above, as a guide to the practice in future cases.

J. Ewart Walker (*Frank Dodd* with him), for the appellant.

H. Durley Grazebrook, for the respondent, was not called upon to argue.

SIR GORELL BARNES, PRESIDENT. On the hearing of a summons under the Summary Jurisdiction (Married Women) Act, 1895, if the magistrates' or justices' clerk authorizes a shorthand note to be taken in place of the ordinary longhand note, the clerk must certify the transcript of such note as correct, and the clerk cannot get rid of his responsibility to take a note himself unless he so certifies the transcript of the shorthand note which he authorizes to be taken.

Unless the parties both agree to the taking of a shorthand note in place of the longhand note usually taken by the magistrates' or justices' clerk, such longhand note must be taken, and in any event no extra expense must fall upon the parties in case either of them should require a transcript of the note for the purpose of an appeal.

The conclusion of facts arrived at by the chairman is this: "The fault has been entirely on the part of the husband. He has distinctly and emphatically stated that he declines to live with his wife; he has unblushingly flaunted another woman in her face; and she has had to submit to no end of provocation down to the present moment. We have no hesitation in granting a separation and the only question is means." The real question is whether there is any evidence to support that finding.

The position seems to be that this man and woman were living in a house belonging to the daughter and furnished with furniture belonging to the daughter. The wife found the husband in the company of another woman, and spoke to her about it, and the husband then said to his wife, "I will not come near you again, but I will come to the house." He never did come near

1908

ROYLE v. ROYLE.

The President.

her again, and never provided her with sixpence. The inference is obvious. The man said in effect that he would continue to use his daughter's house, but would not come near his wife any more. The daughter would not put up with it, and removed her furniture, and this woman has since found shelter in the daughter's new home.

As to the agreement which was afterwards signed, it is bad on the face of it, and the point attempted to be made in regard to that has nothing whatever of substance in it.

The appeal must be dismissed with costs.

BARGRAVE DEANE J. concurred.

Solicitor for appellant (husband): *W. Shepley Ash, for H. F. Neale, Liverpool.*

Solicitor for respondent (wife): *William Pingree Ellen, for John Peace, Liverpool.*

H. D. G.

[DIVISIONAL COURT.]

1908
Nov. 18.

THE CORDELIA.

Admiralty—Demurrage—Construction of Charterparty—"In regular turn."

By charterparty it was agreed between the plaintiff, shipowner, and the defendants, charterers, that the plaintiff's vessel should "proceed to the Nob near Topsham in the river Exe, or to Topsham Quay, as ordered on arrival . . . . and deliver the (defendants' cargo of 180 tons of phosphate) in regular turn with other seagoing vessels at the average rate of thirty tons per weather working day."

The plaintiff's vessel was ordered to, and duly arrived at, the Nob; but, though ready to deliver her cargo, she was kept waiting some days whilst another vessel, also consigned to the defendants, and already there, was being discharged by lighters sent by the defendants, after which the discharge of the plaintiff's vessel was proceeded with. The plaintiff claimed demurrage, at the agreed rate per day, on the ground that the time allowed for unloading began to count from the day the vessel was in her discharging berth at the Nob ready to deliver her cargo, and that the lay days had been exceeded. The defendants contended that they had complied with the terms of the charterparty by commencing the discharge of the plaintiff's vessel "in regular turn" on the day

1908

THE CORDELIA.

after the completion of the discharge of the other vessel at the particular discharging berth to which the plaintiff's vessel had been ordered:—

Held by the Divisional Court (Sir Gorell Barnes P. and Bargrave Deane J.), affirming the judgment of the Court below in favour of the defendants, that "in regular turn" at the Nob meant one vessel at a time.

APPEAL by the plaintiff, Edward Roberts, of Portmadoc, owner of the *Cordelia*, in an action for demurrage, against a decision of the judge of the City of London Court in favour of the defendant charterers, Odams' Manure and Chemical Company, Limited, of London.

The plaintiff's claim arose out of an agreement by charter, made in London, dated November 22, and bill of lading, dated November 30, 1907, with reference to the carriage in the plaintiff's vessel of a cargo of 180 tons of unground gafsa phosphate in bulk from London to Topsham.

By the terms of the charterparty the *Cordelia*, a schooner of ninety-one tons net register, was to load the cargo in the Thames, and "therewith proceed to the Nob near Topsham in the river Exe, or to Topsham Quay, as ordered on arrival, after reporting at the company's offices, Topsham, and deliver the same in regular turn with other seagoing vessels, at the average rate of thirty tons per weather working day." Vessel to be consigned to charterer's agent at port of discharge for ship's business on usual terms. "Freighter to have the option of keeping the ship ten days on demurrage at 2*l.* per day."

By the bill of lading, signed in London by the master of the *Cordelia*, "now riding at anchor at this port and bound for Topsham (at the Nob or Quay)," the cargo was to be delivered "at discharging berth in terms of the charterparty."

The vessel arrived at Topsham on December 21, and was ordered to the Nob, which she reached on Sunday, December 22, where she was moored and, at low water, took the ground, the master giving the defendants notice that he was that day ready in a discharging berth.

By his particulars the plaintiff alleged that on December 23, 1907, the vessel was "on turn and lay days commenced," that on December 31 the "six lay days allowed by charter expired" (that is, nine days less two days Christmas holidays and one

Sunday), and that the vessel was eleven days on demurrage, namely, from January 1 to 11, 1908, at 2*l.* per day, and the plaintiff claimed 22*l.*

By their defence the defendants said that "by the terms of the charterparty the *Cordelia* was to be discharged in regular turn with other seagoing vessels at the average rate of thirty tons per weather working day," and that "the *Cordelia* came on regular turn on January 3, and, at the above rate, her cargo of 180 tons should have been discharged by the 9th, whereas she was kept until the 11th," and for demurrage for two days at 2*l.* a day they tendered, before action brought, and paid into Court the sum of 4*l.*

According to the evidence the defendants have three lighters and three discharging places in the river Exe, namely, Topsham Quay, about two miles from Topsham at the Nob, and Exmouth Bight, about three miles below the Nob, and the practice was alleged by the defendants to be for "vessels at each of the three berths to take their turn separately, and distinct from the other berths." A vessel called the *C. E. Spooner* arrived on the afternoon of Sunday, December 22, and was ordered to Exmouth Bight, where she began discharging into a lighter sent down to her on December 30. There was another seagoing vessel, the *Lord Napier*, discharging at the Nob when the *Cordelia* arrived there. She finished discharging on January 2, and the next day the discharge of the *Cordelia* began, and was completed at 5.30 P.M. on January 11.

In giving judgment on October 21, 1908, the learned judge of the City of London Court said: "I do not think in this case the defendants' contention that they were entitled to take away all their barges from the Nob and send them to discharge another ship at Exmouth Bight and so delay the unloading at the Nob is well founded. I think that they are bound to go on discharging at each of these places separately, and they must have proper barges to discharge at each of these places. When we come to the Nob, I think the regular turn at the Nob for seagoing vessels is proved to be one at a time. I think that has been their practice. The witnesses called for the defence say that discharging more than one at a time could be done with difficulty, but I do not think that is regular turn. I think

1908

THE CORDELIA.

regular turn at the Nob meant one at a time. It is admitted that the *Lord Napier* came first, and was entitled to be discharged before the *Cordelia*, and that as soon as the *Lord Napier* was finished the *Cordelia* was taken on. If the plaintiff could have shewn that there was any delay in discharging the *Lord Napier* and the barges were taken away elsewhere, and not used for the *Lord Napier*, and consequently that the day of the beginning of the discharge of the *Cordelia* was postponed, I think the plaintiff would have made out his case; but there is no evidence which satisfies me that the *Lord Napier* was not discharged with usual despatch. That being so, I think the *Cordelia* came on in her regular turn, and there will be judgment for the defendants with costs." Leave to appeal.

On appeal:—

C. Robertson Dunlop, for the appellant (plaintiff), owner of the *Cordelia*. Under the charterparty the time allowed for unloading began to count from the time the plaintiff's vessel was in her discharging berth at the Nob ready to deliver her cargo. The delay in commencing to unload her was due to the defendants having only three lighters available for discharging vessels at Topsham Quay, the Nob, and Exmouth Bight. No lighter was supplied to the *Cordelia* between December 23, 1907, the date of her readiness to discharge, and January 2, 1908, inclusive. During part of that period lighters were supplied by the defendants at the Nob to the *Lord Napier*, which arrived before the *Cordelia*, and at Exmouth Bight to the *C. E. Spooner*, which arrived after the *Cordelia*. Evidence was wrongly admitted of the practice of the defendants with regard to vessels ordered to the Nob, namely, to finish the unloading of one vessel before commencing to unload another which is in her discharging berth, but has arrived after her, and to supply, according to their own convenience, lighters available for the unloading of vessels at the Nob to other vessels in discharging berths at other places in the river Exe. This alleged practice did not constitute a custom of the port. It was unreasonable, uncertain, and inconsistent with the express terms of the charterparty as to "regular turn," which required that the charterers should have sufficient lighters

to unload the vessel as soon as she was in her discharging berth: see as to "regular turn" referring to the order of readiness, and not to the entry in a "turn book," *Lawson* v. *Burness* (1), and as to "customary turn," with reference to having trucks ready, *The Sheila*. (2)

[THE PRESIDENT. The case of *The Sheila* (2) does not seem to have any material bearing on the present question.]

It shews that "customary turn" did not apply to the mode of loading which was adopted by the agents of the charterers, but to the ship's getting to the loading place. On the other hand, the case referred to by the defendants in the Court below, *Barque Quilpué, Ld.* v. *Brown* (3), in support of their view was not in point, as there the vessel was unable to get a loading berth.

D C. Leck, for the respondents (defendants), was not called upon.

SIR GORELL BARNES, PRESIDENT. My opinion is that in this case the learned judge below was quite right. I see no reason to differ from him, and I agree with the reasons which he gave in the decision he arrived at. It looks to me as if the plaintiff expected that his vessel would find a string of barges when she got to the Nob. I am afraid the plaintiff could not reasonably expect more than that he should have his vessel discharged in regular turn with other seagoing vessels which were being discharged in turn and with the usual despatch. The terms of the charterparty do not justify the plaintiff in expecting more than that. The appeal will be dismissed with costs.

BARGRAVE DEANE J. concurred.

Solicitors for appellant (plaintiff): *Holman, Birdwood & Co.*
Solicitor for respondents (defendants): *Robert Greening.*

T. L. M.

(Note.)

THE SHEILA.

(December 3, 1907.)

Admiralty—Demurrage—Charterparty—'Customary Turn."

Appeal by defendants, the West of England China Stone and Clay Company, Limited, of St. Austell, against a decision of the judge of the

(1) (1862) 1 H. & C. 396. (2) See Note.
(3) [1904] 2 K. B. 264.

1908

THE CORDELIA.

Truro County Court in favour of the plaintiff, Edward W. Turner, of Garston, owner of the steamship *Sheila*.

By charterparty dated March 26, 1907, it was agreed between the plaintiff as owner of the *Sheila* and the agents of the defendants that the ship should proceed to Great Western Railway jetties, Fowey, and there load from the said merchants "in the customary manner a full and complete cargo of china clay and china stone in bulk . . . . customary turn by Great Western Railway as for steamers at Fowey to be allowed the merchants (if the ship be not sooner despatched) for loading the said cargo at Fowey." If required, the vessel was to lie ten days on demurrage at 8*s.* per hour for every hour's detention over and above the said lying time.

The vessel arrived at Fowey at 5 A.M. on Thursday, March 28, and was moored to a buoy in the harbour, waiting for a berth. At 10 o'clock A.M. on March 29 the master was informed that a berth was vacant, and the ship was moored alongside the berth at 10.15, but no cargo was loaded that day, as it was Good Friday. Loading was started at 2.45 A.M. on Saturday, March 30, but, in consequence of the failure of the charterers to send down sufficient cargo to the jetties, only about 150 tons of cargo was got on board at 10 P.M. on that day, whereas it was alleged that if the cargo had been down the whole could have been easily loaded by that time and the ship got to sea. The stevedores were, it was alleged, constantly waiting for waggons to come from the clay pits. The full cargo of 534 tons was not completed until 3 P.M. on Tuesday, April 2, 1907, and the ship sailed from Fowey at 3.30 P.M. on that day. The plaintiff claimed 25*l.* 8*s.* demurrage from 12 o'clock midnight on Saturday, March 30, to 3.30 P.M. on Tuesday, April 2, 1907—63½ hours at 8*s.* per hour.

The learned county court judge in the course of his judgment said:

The vessel was chartered to proceed to Great Western Railway jetties, Fowey, &c., and take from the said merchants or their agents, in the customary manner, a full and complete cargo of china clay and china stone in bulk. The charterparty goes on, "Customary turn by Great Western Railway as for steamers at Fowey to be allowed the merchants (if the ship be not sooner despatched) for loading the said cargo at Fowey."

The facts, which were not disputed, were as follows: The *Sheila*, which could hold 530 tons, arrived at 5 A.M. March 28, waiting for loading berth at 10 o'clock on March 29 (which was Good Friday). She was ordered to No. 1 jetty, Great Western Railway, on Saturday, March 30. Loading was begun at 2.45, and only 150 tons were loaded on that day owing to there not being sufficient cargo. No work was done on Sunday or Monday, which was Bank Holiday. On the Tuesday work began at 3 A.M., and although there were delays in producing cargo, the remainder, 384 tons, was loaded by 3 P.M.

It was admitted on the part of the defendants that if the cargo had been ready the ship could have been entirely loaded and could have got away on Saturday night. On the part of the defendants it was alleged that it was an impossibility to have the whole of a ship's cargo ready waiting upon the quay, having regard to the rest of the business of the port. The managing owner of the defendants said that the *Sheila* had extraordinary despatch because the larger part of her cargo was in

1908

THE CORDELIA.

private trucks instead of waiting for Great Western Railway trucks. The china clay came from Drinnick, about ten miles from Fowey. The station-master at Fowey agreed that it would be impossible to have all the cargo on the quay.

Counsel for the defendants put in an application form, signed by the master of the *Sheila*, by which he agreed to accept the terms and conditions of the Great Western Railway shipping regulations at Fowey, which, he contended, made the company the agent of the shipowners and the charterers. I think the effect of this document is that the shipowner agrees to abide by the rules of the port. Counsel for the plaintiff contended that as no time was mentioned the charterers were bound to provide a cargo so that the ship could be loaded in a reasonable time, and in support of his contention he quoted the case of *Ardan Steamship Co.* v. *Andrew Weir & Co.* (1), which was the only case quoted at the bar. It appears to me that that case is on all fours with the present one. Before I go further it is necessary to find out what was the cause of the delay in providing the cargo.

The delay was caused by the Great Western Railway in not forwarding the trucks from Drinnick Mill. The *Sheila* was berthed on Good Friday and could have been easily loaded on the Saturday. It has been held that where the cargo has to be taken from some known place, and the charter has been made with the knowledge of both parties that it may be delayed by particular circumstances, the charterer is excused: *Harris* v. *Dreesman.* (2)

Counsel for the defendants endeavoured to shew that it was known in the present case that the loading of the cargo might be delayed, because the *Sheila* had been to Fowey four or five times before, and, secondly, that she had been in August last, after the date of the charterparty in question, and that she had taken three days loading then; but there was no evidence as to how long the *Sheila* took to load on the previous occasion, and certainly the fact of her taking three days in August cannot fix the shipowner with notice of any particular circumstances in March. I hold, therefore, that the shipowner had no notice of any circumstance tending to delay the provision of the cargo.

Counsel for the plaintiff contended that it was the duty of the charterers to have sufficient cargo alongside to cause no delay in loading. The charterparty says that the ship must load "in the customary manner." It is well settled that this means the manner of loading at Fowey, which is by tipping the waggon load down shoots at low tide, and by crane and buckets at high tide. Then I have to consider what is the meaning of the clause "Customary turn by Great Western Railway as for steamers at Fowey to be allowed the merchants (if the ship be not sooner despatched) for loading the said cargo at Fowey." I have come to the conclusion that the clause refers only to the rules for loading steamers at Fowey, and I do not think it can be said to include delay caused on the Great Western Railway before the cargo got to the port.

I cannot accept the suggestion that steamer turn by Great Western Railway is not the same thing as colliery turn in *Ardan Steamship Co.* v. *Andrew Weir & Co.* (1)

(1) [1905] A. C. 501. (2) (1854) 23 L. J. (Ex.) 210.

1908

THE CORDELIA.

I hold, therefore, that the delay was caused by the failure of the charterers to provide a cargo, and that the time taken was not a reasonable time. I further hold that the charterers have failed to satisfy me that it was reasonable under the circumstances, or that there was any clause in the charterparty which excused the delay.

The defendants must pay damages for the detention, and I give judgment for the plaintiff with costs.

On appeal to a Divisional Court sitting in Admiralty:—

J. A. Hamilton, K.C., and *Lewis Noad*, for the appellants (defendants).

C. Robertson Dunlop, for the respondent (plaintiff).

The arguments of counsel fully appear from the following judgment:—

BUCKNILL J. We are of opinion that this appeal fails. The learned judge has found that in fact the delay was caused by the failure of the charterers to provide a cargo, and the time taken to do so was not a reasonable time.

It is admitted by counsel for the appellants that the contract here, as between the shipowner and the charterer, is that the ship shall be loaded within a reasonable time after she is ready to take the cargo, and the learned judge has found that the cargo was not loaded within a reasonable time after the ship was ready to receive it, and counsel do not deny that but for one particular clause in the charterparty they must fail, because the learned judge has found as a fact that the Great Western Railway Company were acting as agents for the charterers to provide trucks and take down those trucks when loaded with this china clay, as and when the Great Western Railway Company thought fit to do so. There is no evidence to shew that the shipowner had any idea that such a condition of things was going to happen. Then counsel for the appellants pointed out that there was a clause in the charterparty which enabled them to say that the shipowner had contracted himself within such a state of things. That clause is this: "Customary turn by Great Western Railway as for steamers at Fowey to be allowed the merchants (if the ship be not sooner despatched) for loading the said cargo at Fowey"; and they say those words "customary turn . . . . for loading the said cargo" mean not only that the ship is to take her turn to get at the jetty where she is to be loaded, but mean a great deal more, namely, customary turn with regard to the manner of loading after she has got there, according to the will of the Great Western Railway Company, and that, that being so, the shipowner cannot complain at the delay which has taken place, because he has contracted that everything shall be done according to the habits and customs of the Great Western Railway Company. The word "customary" does not seem to me to apply at all to the mode of loading which they choose to adopt in loading ships which come to their jetty, but in my opinion it applies only to the ship's getting to the loading place—the customary turn for loading. The construction relied on by counsel for the appellants is far too elastic. The learned judge said this: "Counsel for the plaintiff contended that it was the duty of the charterers to have sufficient cargo alongside to cause no delay in loading. The charterparty says 'The ship must load in the customary manner.' It is

well settled that this means the manner of loading at Fowey, which is by tipping the waggon load down shoots at low tide, and by crane and buckets at high tide."—We agree.—"Then I have to consider what is the meaning of the clause 'Customary turn by Great Western Railway as for steamers at Fowey to be allowed the merchants (if the ship be not sooner despatched) for loading the said cargo at Fowey.' I have come to the conclusion that the clause refers only to the rules for loading steamers at Fowey, and I do not think it can be said to include delay caused on the Great Western Railway before the cargo got to the port."

We agree with regard to that latter part of the clause that it does not apply to the delay caused on the Great Western Railway before the cargo gets to the port. The cases cited by counsel for the appellants seem to us not to apply. The whole sum of this case is that the Great Western Railway Company have chosen to make arbitrary rules with regard to the mode in which they will load certain ships after they get to the jetty—just as they chose to do. That is not the contract which the shipowner has entered into. He has entered into the usual contract, well known to persons who have anything to do with ships, that the charterer shall load the shipowner's ship within a reasonable time and in the customary manner with the cargo which he, the cargo owner, is bound to provide for that purpose. I think the learned judge has taken a proper view here with regard to the facts—there is no question about them—and with regard to the law also. Therefore the appeal must be dismissed.

BARGRAVE DEANE J. concurred.

Solicitors for appellants (defendants): *Rawle, Johnstone & Co., for Whitford & Sons, St. Columb.*

Solicitors for respondent (plaintiff): *Holman, Birdwood & Co., for Robert Dobell, Truro.*

1908
Nov. 30.

THE CLUTHA BOAT 147.

Admiralty—Collision—Fog—"Fairway" of River—Duty to ring Bell when at anchor—Medway Conservancy By-laws, arts. 43 (*c*), 48—*Seamanlike Precaution.*

The plaintiffs' sailing barge, whilst at anchor to the northward and westward of the Upper Mussel buoy in Long Reach of the river Medway, was run into by a steam tender, in charge of the defendant, conveying liberty men from Chatham Dockyard to two of His Majesty's vessels moored further down the river. The weather was thick with fog, and, though daylight, the barge was exhibiting her riding light; but her bell was not being rung. The barge was suddenly seen a few yards ahead, and the stem of the tender struck the port side amidships of the barge a heavy blow and sank her :—

Held by Sir Gorell Barnes, President, that the negligence of those in charge of both vessels had contributed to the collision, and both were to blame, for the barge was in the "fairway" as defined in *The Blue Bell*, [1895] P. 242, and, therefore, on account of the fog, bound to ring her bell under art. 43 (*c*) of the Medway Conservancy By-laws; but if not coming under that article, she was, in the circumstances, and in the opinion of the nautical assessors, bound to indicate her position by sound signals as a seamanlike precaution within the meaning of art. 48 of the same by-laws. The defendant was to blame for continuing to keep the tender under way after the fog became so thick that the look-out could only see a few yards ahead, and, considering the force with which the blow must have been struck, the tender was being navigated at an immoderate speed.

Action by plaintiffs, Henry Peters and others, owners of the sailing barge *Alice* and of her cargo, and her master and crew claiming for the loss of their clothes and effects, to recover the amount of the damage sustained by them in consequence of a collision with H.M. *Clutha Boat* 147, in charge of the defendant, John Henry Cossey.

The case involved the consideration of arts. 41, 43, and 48 of the Medway By-laws. (1)

(1) By-laws made under the Medway Conservancy Act, 1881, and approved by the Board of Trade and Admiralty on October 9, 1896 :

"*Interpretation.* 1. . . . . The word 'vessel' shall include any . . . . barge . . . . but shall not include any vessel belonging to the Royal Navy, or for the time being employed by any department of the Government as a hired transport.

"The word 'river' shall mean so

1908

THE CLUTHA BOAT 147.

On July 24, 1908, about 6.50 A.M., the plaintiffs' sailing barge *Alice*, of forty-two tons register, and drawing a little over four feet, was lying at anchor inside the Mussel Bank, in Long Reach of the river Medway, in the course of a voyage from Rochester to the London Docks with a cargo of cement in barrels. The tide was flood of the force of one to two knots in the channel, and the weather at the material time was thick fog. The barge was still exhibiting her riding light on the forestay; but her bell was not being rung, her two hands being below asleep. In these circumstances she was run into by the *Clutha Boat* 147, a steam twin screw tender attached to Chatham Dockyard, ninety-two feet long, fitted with compound engines, and manned by a crew of five hands, which was proceeding, in charge of the defendant, down the river Medway, with some liberty men, from the dockyard to His Majesty's ships *Charybdis* and *Vindictive*, moored in Kethole Reach. The tender was sounding her whistle for fog, and had shortly before the collision stopped her engines to listen for sound signals; but, going on again, suddenly saw the barge close to ahead, and, before she could be stopped, the tender with her stem struck the port side amidships of the *Alice* and sank her.

The plaintiffs alleged, inter alia, that the tender was proceeding at an excessive speed, was navigating out of the fairway, was improperly under way, and failed to comply with arts. 13 (look out), 15 (stop and reverse), 41 (fog), 47 (special circumstances), and 48 (proper precautions) of the Medway Conservancy By-laws.

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much and such portion of the river Medway as is within the limits of the Medway Conservancy Act, 1881.

"*Fogs.* 41. All vessels entering or being overtaken by a fog shall be navigated with the greatest caution and at a very moderate speed, and if necessary come to an anchor.

"43. In fog, whether by day or night, the signals described in this By-law shall be used, that is to say . . . .

"(*c*) All steam vessels and all sailing vessels when at anchor in the fairway of the river shall at intervals of not more than two minutes ring the bell.

"48. Nothing in the before mentioned By-laws numbered 13 to 46 (Navigation, Lights, Fog, Signals) shall exonerate any vessel or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

1908

THE CLUTHA BOAT 147.

On behalf of the tender it was alleged that those in charge of the plaintiffs' barge neglected to keep any look out, to ring her bell, and to comply with arts. 43 (*c*) and 48 of the Medway By-laws, and arts. 15 (sound signals for fog) and 29 (proper precautions) of the Regulations for Preventing Collisions at Sea, 1897.

According to the preliminary act, filed on behalf of the plaintiffs, the place of collision was "out of the fairway in Long Reach." According to the defendant it was "a little above and to the northward and westward of the Upper Mussel buoy." The actual spot is indicated in the judgment.

1908. Nov. 30. *Bailhache, K.C.*, and *C. Robertson Dunlop*, for the plaintiffs. By art. 39 of the by-laws of the Medway Conservancy a vessel at anchor in the river must in all weathers, from sunset to sunrise, carry a white light; but, in the case of fog, it is only when the vessel is at anchor in the "fairway" that she "shall at intervals of not more than two minutes ring the bell." The barge was anchored in the "fairway" in the sense that she was lying where vessels of light draught, like herself, can navigate; but she was in a shallow part of the river where submarine mining operations are carried on, as notified by art. 71 of the by-laws, and was out of the channel of general navigation referred to in that article, and described in part 3 of the North Sea Pilot, 7th ed. (1905). The barge was, therefore, not in the fairway so as to be obliged to ring her bell, and the evidence shews that the defendant navigating the *Clutha Boat* had lost his way in the fog, and in getting anywhere near the barge he was in unfrequented waters altogether out of his course. The cause of the collision was, therefore, the negligence of the defendant in proceeding on in weather in which it was not prudent to be under way, and the nature of the damage sustained by the barge shews that the speed of the steam tender was excessive.

Laing, K.C., and *A. D. Bateson*, for the defendant. The *Clutha Boat* 147 is a small handy craft of light draught with twin screws, and could easily have got out of the way if those in charge of the barge had, apart from any rules, taken the simple seamanlike precaution of indicating her presence by ringing the

bell. This negligence on their part caused the collision. The damage done to the barge was due to the way in which she was struck, for the speed of the steam tender was not excessive. The evidence shews that she did not average four knots over the whole distance, the first part of which was done, in fairly clear weather, at half speed, and, in the period immediately preceding the collision, the boat was stopped for several minutes in order that those in charge might listen for sounds indicating danger.

Bailhache, K.C., in reply. In the case of *The Blue Bell* (1) a steamer, during fog, ran into a barge anchored inside the West Blyth buoy in Sea Reach of the river Thames, and Bruce J., in delivering the judgment of the Divisional Court, said that "it would only have been an act of common prudence that the (steamship) *Blue Bell* should at once have dropped her anchor when she came into the bank of fog . . . . We think that the *Blue Bell* is to blame for continuing to proceed, even though at a moderate speed, after she entered the fog for a period of ten minutes or more." These observations apply to the negligent navigation of the *Clutha Boat* by the defendant.

SIR GORELL BARNES, PRESIDENT. In this case the plaintiffs are suing for the damage done to their sailing barge *Alice* by a collision between their barge and H.M. *Clutha Boat* 147, which took place on July 24, 1908, at about 6.50 in the morning.

The barge *Alice* was laden with a cargo of cement, and was carrying two hands. She had anchored in the Medway at a spot about which there is a little dispute. The spot has been marked on the chart in two places, both to the northward and eastward of the gas buoy opposite Darnett Ness, and between that buoy and the shallower soundings on the Mussel Bank. The plaintiffs marked the spot on the chart before me with a red cross, and Lieutenant Bevan has given the bearings of the buoys and flagstaffs, which shew a spot a little northerly and westerly of the plaintiffs' spot. That was the place where the wreck was, and it must be very near—possibly not the precise spot, but very near—the spot where the collision took place.

While lying at anchor in that spot, the *Alice* was run into by

(1) [1895] P. 242, at p. 247.

1908

THE CLUTHA BOAT 147.

The President.

the *Clutha Boat* 147 at a time when it must have been broad daylight. There had been a light put up on the *Alice*, and it is said that that light was still burning. I daresay it may have been, but, being broad daylight, I do not think that that fact is material; and one other matter is quite clear, that at the time of the collision the only two men who were on board the *Alice* were down below, and no sound, by bell or otherwise, was being made on board the *Alice*.

The *Clutha Boat* had come down from Chatham Dockyard with a crew of five hands, and some liberty men, whom they were taking down to two of His Majesty's ships which were lying in Kethole Reach. At the time when the boat started the weather was not very thick, but it was hazy. As she got lower down it was very hazy, and it got so thick that the captain or master, whatever his correct title is, on board that boat could not see, or only with difficulty could see, the men standing thirty or forty feet forward on the look-out, and the men on the look-out could only see the barge that they struck, although it was broad daylight, at a distance of about seven yards. The collision was apparently nearly at right angles, and the blow was so violent that the whole side of the barge was cut through in the way indicated by the surveyor, and the cement barrels with which she was laden were also cut into and damaged to a certain extent, as the same surveyor pointed out in some little models which he produced. There is no doubt that it was a very violent blow, for the barge sank in a few minutes.

I think the *Clutha Boat* had more or less, in the fog, lost her way, and got out of the proper course down. She came past the gas buoy called the Folly Bank gas buoy, but she did not see the next gas buoy, which shews how thick it was, and she did not see another barge lying there, although she must have passed close to it, out of the ordinary way which she would have passed if she had gone straight down Long Reach.

Under these circumstances the plaintiffs are in this difficulty. They were not ringing their bell, according to the rule which requires that it shall be rung when a vessel is at anchor in the fairway of the river, and I have no doubt—and this is a matter

1908

THE CLUTHA BOAT 147.

The President.

upon which I have taken the advice of the Elder Brethren—that this vessel was at anchor in the fairway within any reasonable meaning that can be given to the wording of the rule. It must be noticed that the rule in question follows rules which deal with lights to be carried by vessels lying in the river at anchor, and I should be prepared to hold, if it were necessary, that these rules must be read together, and that where the vessel is at anchor in the ordinary course of her navigation, not high and dry on the bank somewhere, she ought to ring her bell in circumstances where ringing a bell is required, just as much as she should put up an anchor light. I do not know whether it is necessary to go quite so far as that in this case, because, when one looks at the chart and the configuration there, it cannot be said that this vessel was out of the fairway completely. She was in a part in which, according to the evidence, small vessels might and do go when they are tacking up and down the river, according to the state of the wind.

That being so, those in charge of the plaintiffs' barge are in fault in not ringing their bell. But whether that view, as to the rule being applicable, is right is not of great importance here, because, under art. 48, which requires that there shall be no neglect of any precaution required in the circumstances of the case by a seaman, the Elder Brethren advise me that undoubtedly, in the position in which this vessel was, and when the weather was such that other vessels might get out of their course, it was essential that a bell should be rung, that is to say, signals should be made, to indicate where this vessel was.

With regard to the other side of the case, there is not the slightest doubt in my mind that the vessel which was in charge of the defendant was being taken down in circumstances in which she ought not to have been moving at all. I agree that the fog came on after he had started, and that he was in some difficulty with regard to his liberty men, who would wish to be taken down to their ships; but the mere fact that people are going to be taken down to their ships does not justify a man going on in fog so thick that it is not safe to go on. They might have to wait for their food possibly a little longer, as they might have to turn back, or grope along, and possibly wait until there

1908

THE CLUTHA BOAT 147.

The President.

was no danger; but, whether the defendant was right or wrong in that, in this case there is no doubt that the vessel's speed at that time must have been serious. No vessel could strike a blow such as is indicated, and yet say that she could safely go on at a speed which would allow her to do that, whilst the weather was such that it would only allow those on board her to see an object seven yards off. It is impossible to support such a view.

The only other difficulty is this. It is said by the plaintiffs, "It is entirely the fault of the defendant, even if we did not ring the bell, because he had no business to be under way." It is said by the defendant, "Although in fault for being under way and going too fast, yet if you had rung your bell I should have heard it, and would have avoided you, and therefore I am not to blame in fact, in the circumstances, for what I did."

I agree with counsel for the plaintiffs that this case is substantially on all fours with *The Blue Bell* (1), and it could hardly have been left out of consideration there that the other ship in that case, which was under steam, was not only the subject of blame, but that she was a contributory in the blame for the disaster which happened. It is impossible to follow out the working of the law with such nicety that you can differentiate between the precise amount of blame in one case and in the other case. It is a very difficult thing even to appreciate the precise amount of blame in such a case. But the plaintiffs recover to the extent of half in the Admiralty Court, although with ordinary care exercised up to the moment of collision, their vessel could have avoided the collision, and if the other vessel, the defendant's vessel, by the like care could have avoided the collision. There is a combination of two contributory causes which produced this disaster; and it is refining it too much, it seems to me, if it be said that there being negligence in not sounding a bell, if the bell had been sounded, there would have been no disaster, and therefore that the whole of the damage ought to be borne by the plaintiffs. I do not agree with that view, and the only safe finding I can come to in the case is that the faults or defaults on both these vessels contributed to this

(1) [1895] P. 242.

disaster. That means that the ordinary decree of both to blame, applicable in a case of this kind, must follow. 1908

THE CLUTHA BOAT 147.

Judgment for plaintiffs for moiety of damage sustained, on the footing of both vessels being to blame for the collision.

Solicitors for plaintiffs: *J. A. & H. E. Farnfield.*
Solicitor for defendant: *The Treasury Solicitor.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A. 1908 *Dec.* 16, 17.

THE ST. PAUL.

Admiralty—Collision—In or approaching Falling Snow—Sound Signals—Speed—Regulations for Preventing Collisions at Sea, 1897, *arts.* 15, 16.

A cruiser proceeding up, and a New York liner proceeding down, the Solent on nearly opposite courses, and in about mid-channel, sighted one another at a distance of about half a mile, each having the other a little on the port bow. The speed of both vessels was nearly ten knots, and the cruiser when seen was coming out of a snow flurry, whilst the liner was in comparatively clear weather. Those in charge of the cruiser, under the mistaken impression that the liner was starboarding, starboarded their helm, thereby bringing their vessel across the bows of the liner, and, at the last, ported to throw their quarter clear. Those in charge of the liner stopped, then blew one short blast and ported, at the same time reversing the starboard engine, and subsequently also the port engine; but the two vessels came into collision, the liner striking the cruiser on the starboard side amidships and sinking her.

In the Court below the cruiser was found alone to blame for improper starboarding. On appeal it was contended that the liner was also to blame for excessive speed in the condition of the weather, and for failure to indicate her position by sound signals:—

Held by the Court of Appeal, that both charges against the liner failed, for, though good seamanship required that she should be going at a speed which would be moderate when she herself was enveloped in falling snow, her speed at the material time, and in the weather conditions then prevailing, was not excessive; and, secondly, though good seamanship would suggest to those in charge of the liner the advisability as in the analogous case of fog—*The N. Strong*, [1892] P. 105—of giving warning of the presence of their vessel by sounding the signal when approaching falling snow, yet as both vessels saw one

C. A. 1908

THE ST. PAUL.

another at a distance and in sufficient time to enable them, with reasonable care, to pass each other in safety, the absence of sound signals on the part of the liner did not contribute to the collision.

Quære whether, when the liner was approaching falling snow, the responsibility for giving sound signals rested with the master or with the pilot in charge by compulsion of law.

APPEAL by plaintiffs, the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, and the officers and crew of H.M.S. *Gladiator* (suing for their lost effects), in an action of damage by collision, against a decision of Sir Gorell Barnes, President, in favour of the defendants, the International Mercantile Marine Company of New Jersey, the owners of the *St. Paul*.

The case is reported at length in the Court below (1), where, for the reasons given in the judgment of the President, this action and a cross-action, though not consolidated, were tried together, and, by consent, the case dealt with as between ship and ship. (2)

The facts, so far as material for the purposes of the appeal, were shortly as follows:—

On April 25, 1908, about 2.28 P.M., the tide being flood, setting to the eastward with a force of two to two-and-a-half knots, and the wind strong from the north-westward with squalls and, at times, snow flurries, H.M.S. *Gladiator*—a second-class protected cruiser of 5750 tons displacement, 320 feet in length, and 57 feet beam, fitted with vertical triple expansion engines of 10,000 indicated horse power and twin screws, and manned by a crew of about 250 hands all told—was in the Solent in (as the Court found) about mid-channel, between Hurst Castle and Victoria Fort, on her way from Portland to Spithead, making about nine knots through the water, heading N. 77° E. (about E.b.N.), and sounding her siren at the regulation intervals for a steam vessel under way in falling snow.

In these circumstances those on board the cruiser saw, at the distance of about half a mile, and bearing a little on the port bow, a vessel which proved to be the twin screw steamship *St. Paul*, of 11,629 tons gross and 5874 tons net register,

(1) [1908] P. 320. (2) Ibid. note (1), p. 321.

554 feet in length, from Southampton to New York, via Cherbourg, with 168 passengers, mails, and a general cargo, manned by a crew of about 362 hands, and in charge of a duly-licensed Trinity House pilot. She was proceeding down the Solent in (as the Court found) about mid-channel, on a course of W. ½ S. magnetic, and, with engines working at half speed, was making from nine to ten knots.

Those in charge of the *Gladiator*, under the mistaken impression that, as the *St. Paul* came in sight, she sounded two short blasts and was acting under a starboard helm, as if intending to pass starboard side to starboard side, starboarded the helm of the cruiser thirty degrees, and so brought their vessel across the bows of the *St. Paul*, with the result that, though the helm of the cruiser was subsequently put hard-a-port in an endeavour to throw her quarter clear, the stem of the *St. Paul* struck the starboard side of the cruiser about amidships, at an angle of from two to three points leading aft, doing great damage, and causing the cruiser to sink with consequent loss of life.

On the *St. Paul* those in charge saw the *Gladiator* coming through a squall at a distance of about half a mile, and bearing about half a point on the port bow. In order the better to make out the other vessel, both engines of the *St. Paul* were stopped, and almost immediately afterwards, as the cruiser was shewing her port side, the helm of the *St. Paul* was hard-a-ported, one short blast was blown on her whistle, and the starboard engine was put full speed astern. The vessels were then in a position to pass safely port side to port side; but the cruiser starboarded, and, although the port engine of the *St. Paul* was also put full speed astern, the collision occurred, causing considerable damage to the liner.

In the Court below H.M.S. *Gladiator* was found alone to blame on the ground that the collision was brought about by her improper starboarding. For the purposes of the appeal the plaintiffs (appellants) admitted that the cruiser was to blame, putting it on the ground of excessive speed; but they contended that the *St. Paul* was also to blame for (1.) excessive speed, and (2.) not giving the appropriate sound signal in the then condition of the weather. With reference to these two points the learned

C. A. 1908

THE ST. PAUL.

judge in the Court below in the course of his judgment said: "The Elder Brethren advise me that, on the facts I have found having regard to the slowing of the *St. Paul* to half speed above Yarmouth, she was not, at the time when the *Gladiator* was seen, going too fast. I see no reason to find that she was going faster than her witnesses say—that is, nine or ten knots when the *Gladiator* was seen—or to hold that her speed was excessive; and I may add that the Elder Brethren consider that half a mile in such a place, especially when vessels must be generally going in opposite directions, is a sufficient distance for them to avoid each other when going at the speed the *St. Paul* was. I agree with that view.

"That brings me to the question of the fog signals. With regard to the absence of fog signals—because it is admitted that none were given on the *St. Paul*—the pilot of the *St. Paul* said that, if the *Gladiator* had not been reported, he would have slowed down and sounded his whistle just at that particular time. The master of the *St. Paul*, F. M. Passow, who is a very experienced navigator, said: 'I thought it was a passing shower, and I did not consider it necessary to use fog signals. I do not think it would have made any difference; we had had snow in places two or three times, but not obscuring; we were just going to slow down when we saw the cruiser.' That, in substance, amounts to this, that they had slowed down to half speed some eight minutes before, that they had observed that there was this squall ahead, and that they were about to sound and slow for it, but at that moment the cruiser appeared. Of course it may be said that that is a very happy coincidence, but I have seen the witnesses, and I do not think they were merely inventing the idea. That, however, does not dispose of the question as to what they might have done before the *Gladiator* was seen at a distance of half a mile. Again, the terms of the article do not in strictness apply. The article which it is necessary to refer to is art. 15, which provides that 'In fog, mist, falling snow or heavy rainstorms, whether by day or night, ... a steam vessel having way upon her shall sound at intervals of not more than two minutes a prolonged blast.'

"As I have already said, the finding of fact which guides me on

this point is that the vessel herself was not yet in falling snow, and so the terms of the article do not apply, but it would be again a question of good seamanship whether, in view of the squall seen coming as her witnesses described, she ought to have sounded fog signals. This being a question of good seamanship, I have consulted the Elder Brethren upon the point, and their statement to me is as follows: They tell me that as a matter of seamanship it would have been advisable for the *St. Paul* to sound fog signals before the time when the *Gladiator* was sighted, having regard to the nature of the squall ahead. They are, however, of opinion that the omission to do so made no difference in this case, and in this opinion I concur.

"To some extent the reasons upon which that opinion is based depend upon questions of fact. I have found the facts, but I may say that their view of the facts is the same as my own.

"There is no doubt that the *St. Paul* gave a short blast after the *Gladiator* was seen at about half a mile distant, but very few of those on board the *Gladiator* heard any sound signal at all. Even those who say they heard signals may be mistaken. Any signal made before this would have been when the vessels were still further apart, and there is no probability that if the *St. Paul* had sounded a fog signal it would have been heard on the *Gladiator*. None of the fog signals of the *Gladiator* were heard by the *St. Paul* except at the last, when the vessels were in sight, and that signal was taken to be a short blast. No previous signal, although the siren of the *Gladiator* had been used, was heard on board the *St. Paul*. The wind was strong and squally from N.N.W. across the course (W. $\frac{1}{2}$ S.) of the latter vessel, so that a whistle from the *St. Paul* was less likely to be heard on the *Gladiator* than one from the *Gladiator* to be heard on the *St. Paul*; but further, if such a signal had been heard, it would only have indicated that there was a steamer approaching down the channel, and her position would not have been ascertained with certainty; and at the time when the *Gladiator* was sighted there was, as I have already said, not the least difficulty in the vessels keeping clear of each other and avoiding collision by the exercise of reasonable care. But for the improper starboarding of the *Gladiator* there would, in my opinion, have been no

C. A. 1908

THE ST. PAUL.

collision, and I am unable to see any ground upon which it can be said that the absence of fog signals had any effect upon the collision."

The Attorney-General (*Sir W. S. Robson, K.C.*), *Batten, K.C.*, *W. Wills*, and *J. G. Pease*, for the appellants (plaintiffs), the Commissioners for executing the Office of Lord High Admiral and others.

Aspinall, K.C., *Laing, K.C.*, and *C. Robertson Dunlop*, for the respondents (defendants), the owners of the *St. Paul*.

In respect of the alleged excessive speed, and absence of signals on the part of the *St. Paul*, the arguments of counsel were the same as in the Court below and fully appear from the judgment of the Lord Chief Justice.

In addition to the cases on these points cited in the Court below, the following were referred to: *The Milanese* (1); *The Kirby Hall* (2); *The Normandie* (3); Marsden's Collisions at Sea, 5th ed. (1904), notes to art. 16, p. 373 et seq. As to both to blame, *Davies* v. *Mann* (4); *The Victoria*. (5) As to the application of common law doctrines in respect of negligence, *The Margaret* (6); *The Sans Pareil*. (7) As to obeying the regulations in time to prevent an impending collision, *The Fenham*. (8)

A further point raised by counsel for the plaintiffs (appellants) both in the Court below and on the appeal, namely, that pilotage on the *St. Paul* was not compulsory—because, it was alleged, that vessel came within certain exemptions created by Orders in Council—was not argued in the Court below, owing to the *Gladiator* being found alone to blame, and, for a similar reason, no decision was given on the point in the Court of Appeal.

1908. Dec. 17. LORD ALVERSTONE C.J. We have listened with the closest attention to this case, and I am sure I may speak for my learned brethren as well as myself when I say we

(1) (1880) 4 Asp. M. L. C. 318; (1881) ibid. 438.
(2) (1883) 8 P. D. 71.
(3) (1890) 43 Fed. Rep. 936.
(4) (1842) 10 M. & W. 546.
(5) (1848) 3 W. Rob. 49, at p. 56.
(6) (1884) 9 App. Cas. 873.
(7) [1900] P. 267.
(8) (1870) L. R. 3 P. C. 212.

are very much indebted to counsel for the appellants for their able arguments. Every point that possibly could be urged on fact and law has been urged by them in support of this appeal on behalf of the King's ship.

Now the appellants are in this position, that they come into Court admitting that the *Gladiator* is to blame. That would have no material bearing upon the appeal in the ordinary sense of the word, inasmuch as it is quite possible that although the *Gladiator* is to blame the *St. Paul* is also to blame; but the importance of it is this, that the blame admitted by learned counsel on behalf of the *Gladiator* is not the blame for which she has been condemned. If the blame in respect of which she has been condemned had been of the character for which counsel for the appellants contend, namely, going too fast, then very different considerations might have arisen; but it is very important, especially as there is no cross-appeal, to remember that the one material finding against the *Gladiator* is that she caused the collision, after the vessels had sighted each other, by starboarding her helm. It is not necessary to consider the question of look-out, which may or may not have conduced to her improper starboarding, or the question whether she was right or wrong in the view she took of the signals which were thought to be heard from the *St. Paul*, or the mistake which Captain Lumsden fell into in thinking the *St. Paul* was in fact starboarding. The importance of it is this, that the learned judge has found, with the concurrence of the Elder Brethren, that the two ships saw one another at such a time that, with ordinary care and prudence, they might have manœuvred so as to pass clear of one another; and I think—although it is not necessary to go so far—I should have found they would have gone clear without any action on either ship. But the case must be argued upon the basis that the Crown do not dispute the finding of the learned judge that the *Gladiator* is to blame for improper starboarding. The *Gladiator* was not cast on the ground that she was going too fast, even though she had certainly been in much thicker weather than the *St. Paul* had been, and I can well imagine and believe, knowing the care with which the King's ships are navigated, that it may very well have been that,

BIBL. LONDIN UNIV.

C. A. 1908

THE ST. PAUL.

Lord Alverstone C.J.

notwithstanding the thickness of the weather, there were circumstances, at the time and in the place, which led to its being necessary she should go at the speed at which she was going. It is sufficient to say that nowhere in this judgment is the *Gladiator* condemned for having gone too fast before she sighted the *St. Paul*. The Attorney-General says, "I do not admit that blame, but I admit the blame that the *Gladiator* was going too fast, and I ask you, the Court of Appeal, to say that the *St. Paul* was also to blame for two reasons: first, that she was going too fast in the condition of the weather, and therefore got, at too high a rate of speed, in the proximity of a snow cloud, in which there was a ship; and, secondly, that in approaching that snow cloud she did not give the signal she ought to have given to a vessel which might be within it."

With regard to the first point, the learned President, with the concurrence of the Elder Brethren, has found that the *St. Paul* was not going too fast, and I must say that, apart from what happened when approaching the snow cloud, I should have come to the same conclusion. It is obvious that there were patches of thick weather due to snow, and I do not myself draw much distinction between fog and snow. There may be a distinction from the point of view of sound, but from the point of view of visibility I should not be disposed to draw much distinction between the duty of a ship in a fog and the duty of a ship with snowstorms about her, because experience tells us that heavy snowstorms may as completely obliterate a ship as fog. Therefore the duty of a ship in the abstract may be quite as high in snow as in fog.

The *St. Paul* had come down Southampton Water and passed the Solent Bank, and had been seen by Lady Montagu certainly not less than two miles off, and had been seen by another witness going down at a distance of certainly upwards of 500 or 600 yards; and there is the evidence of what I may call the snow coming on and passing away—described as "flurries" of snow. It seems to me, therefore, there is no reason for interfering with the finding that the vessel was not travelling too fast. For reasons which I will explain in a moment, I think it is abundantly clear that,

inasmuch as she was not breaking any statutory rule, it is quite impossible to say the speed of ten knots at which she was going was a speed which did in fact contribute to the collision. I say not breaking a statutory rule. Of course, if we had come to the conclusion that all the time she was in weather which was thick with snow, and so was breaking art. 16, we might have had to consider the question from a different point of view. Therefore I come to the conclusion that, with regard to the first attack which is made upon the navigation of the *St. Paul*, namely, that she was going too fast in the then condition of the weather, the appeal fails.

I now come to the second point, which does require careful consideration, and it has received it from counsel for the appellants; and we have heard that which I think was a conclusive argument in answer by counsel for the respondents. The learned judge has found as a fact, and I am not surprised on the evidence he was so advised by the Elder Brethren, that as a matter of seamanship it would have been advisable for the *St. Paul* to have sounded fog signals before the time she sighted the *Gladiator*, having regard to the nature of the squall ahead. Perhaps I may be allowed to say I should have come to the same conclusion quite unaided by the advice we have received, and I see no reason for differing from the learned judge in that respect. The question is what bearing that has upon the decision which ought to be given in this case. It cannot be said that the learned President was not alive to it, because he states the conclusion he came to, on the advice of the Elder Brethren, with regard to that which I may call the proper navigation of the ship under the circumstances, and he has repeated, in emphatic and clear terms, that which I had in my mind before the judgment was read, when he says, "Over and over again we have had cases in this Court where a vessel, not herself in a fog, has been blamed because, seeing fog ahead, although herself not in the fog at all, she has not taken precaution so that her speed shall be moderate when she gets into the fog." In the case of *The N. Strong* (1)—which is one of the cases to which reference has been made—it was laid down that the test of good seamanship

(1) [1892] P. 105.

C. A. 1908

THE ST. PAUL.

Lord Alverstone C.J.

applies both to speed and to the sounding of signals before the vessel gets into a fog. At the end of the judgment in that case I find these words: "I agree it is not an infraction of the rules which refer, in terms, only to what is to be done in a fog; but the Trinity Masters are clear that, as a matter of precaution, the steamer approaching a thick bank of fog should have eased, and should also have whistled to give notice of her position to any vessel which the curtain of fog might be concealing"; and the judgment of the President in the present case shews that the same rule is to be applied to a thick snow squall.

In my opinion this is a matter of great importance, and if it could have been contended successfully on the part of the appellants, or had been raised in the pleadings, or could have been elicited from the evidence, that at the time these two vessels sighted one another they were in such a position that there would be difficulty in the one avoiding the other, or that the *Gladiator* would have had any difficulty as to what manœuvres she was to take, I should have required further argument before coming to the conclusion that this vessel, the *St. Paul*, might not also be to blame. I am putting aside for the moment the other answer of fact that any signals given before the *Gladiator* came in view would not have been heard by the *St. Paul*. What is the position? I have gone carefully through the evidence. Both vessels put the other when sighted at a distance of about half a mile. There is no dispute about the courses, that of the *Gladiator* being N. 77° E., and that of the *St. Paul* W. ½ S. Both vessels agree that when first sighted they were port bow to port bow. Now where were they? They were in a comparatively narrow channel, and I think, and the President thinks so too, that they were both in about mid-channel. Under those circumstances the obvious duty of the approaching vessel was to pass port to port. Being in a narrow channel the starboard hand rule made that imperative. Therefore the *Gladiator* ought to have ported. She has got a large ship slightly on her port bow, and it is almost impossible to imagine that that vessel could have been cleared by starboarding. Therefore it seems to me the learned judge was right where he said, "There was . . . . not the least difficulty for the two vessels keeping

clear of each other and avoiding collision by the exercise of reasonable care. But for the improper starboarding of the *Gladiator* there would have been no collision at all, in my opinion." I agree with counsel for the respondents, and in fact it was admitted by the Attorney-General, that the case originally made in the Court below by the *Gladiator* was that she starboarded because those in charge of her believed that the *St. Paul* was starboarding. Under those circumstances, taking the position of the vessels when they sighted one another and the fact that the blow was only at an angle of about two points or possibly less, it is quite clear that it was the starboarding of the *Gladiator* which in fact put her across the bows of the *St. Paul*, and to my mind it all points to the conclusion that those vessels could with ordinary manœuvres have passed clear of one another. That is not like the case of vessels going on crossing courses, seeing one another under circumstances of difficulty. It is the case of vessels in a narrow channel, whose plain duty it is under every rule to pass port to port, and that rule being disobeyed in the state of mind into which the captain of the *Gladiator* had unfortunately been brought. Now I have only to say that I am quite unable to come to the conclusion that the finding of the President, in which he says that the Elder Brethren are of opinion that the omission to sound fog signals made no difference in the case, and that the signals would not have been heard, was wrong in fact. So far as we have had their assistance, both our assessors agree with the assessors in the Court below that the sounds would not have been heard. It is sufficient to say that there is a great deal in the evidence to support that view.

I have only two other observations to make, which I should like to make because I recognize the importance of this case and I do not wish it to be thought that I have gone further in two matters which may have to be considered on some future occasion. The first is that the learned judge says, "If such a signal had been heard, it would only have indicated that there was a steamer approaching down the channel, and her position would not have been ascertained with certainty." I quite understand how that expression came to be used, and, with regard to the

C. A. 1908

THE ST. PAUL.

Lord Alverstone C.J.

facts of this case, it was a perfectly correct observation, but in my opinion there might be a duty, an imperative duty, on a vessel in the position of the *St. Paul*, approaching a fog or snow bank, to sound her whistle, although such signal would only indicate a steamer approaching. In some circumstances it might be of importance to a vessel in a similar position to the *Gladiator* to know that another vessel was approaching. Therefore I do not wish to appear to indorse anything which involves the view that, because such signals would only indicate a steamer approaching, there would be no duty to give the signal. The other point does not arise on the judgment, but has been raised in argument. I notice that in the course of the argument the learned President indicated that if counsel for the Crown were going to contend that it was the duty of the master, as distinguished from the pilot, to blow sound signals, he would require argument to convince him of that. I reserve my opinion upon that. I am by no means satisfied that in some circumstances it might not be the master who would be responsible for sound signals as distinguished from the pilot; and it might be the duty of the master to call the attention of the pilot to the fact that sound signals ought to be given. I have thought it right to make these observations lest silence should hereafter be taken to shew my acquiescence in the opinions indicated on the two points I have mentioned. While recognizing that in many cases the failure to make sound signals might be sufficient in such circumstances to make a vessel to blame, I see no reason for interfering with what I understand to be the substantial finding of the President in this case, namely, that these two vessels saw one another at a distance at which by ordinary prudence they could have avoided one another, and that the collision was solely brought about by the wrong manœuvre of starboarding unfortunately undertaken by the *Gladiator*. The appeal must be dismissed.

BUCKLEY L.J. I concur, and have nothing to add.

KENNEDY L.J. In this case there was an appeal brought from so much of the judgment of the Court of first instance as decided that there was no blame to be attached to the *St. Paul*,

Now the case so ably presented here was that in two respects there were circumstances, which had not been sufficiently appreciated in the Court below, to shew that the *St. Paul* ought also to be held to blame both in respect of the speed at which that vessel was travelling just before the collision, and also on account of the omission of that vessel to give the sound signal which it was said that under art. 15, or, at all events, as a matter of good seamanship, she was bound to give.

The case, as it seems to me, may be put in a few words. There can be no ground for holding the *St. Paul* to blame—reversing the decision below—unless it can be shewn, if there is no statutory provision involved, that there was a breach of good seamanship which either caused or materially contributed to the collision. With regard to the question of speed I do not desire to add anything to what the Lord Chief Justice has said. It seems to me that it was justly decided by the Court below that in the circumstances there was no improper speed on the part of the *St. Paul.*

The more difficult question was that of the absence of signalling by whistle on the part of the *St. Paul*, especially upon the finding of the learned President that there was, as a matter of good seamanship, a position in which it would have been at any rate right for this vessel to have used the long blast fog signals as she was approaching the snow flurry which veiled the approaching cruiser from her observation ; and I hope that from nothing that this Court has said will it be drawn as an inference from the decision in this case that it is not, as a matter of seamanship, the duty of a vessel approaching anything in the nature of fog, mist, falling snow, or heavy rainstorms, which may hide a ship with which the ship outside—unless the ship inside the veil is warned—may come into collision, in good time to give warning by sound signal to the hidden ship. In this particular case there is not—it not being, in my opinion, a case under art. 15—a presumption against the *St. Paul* for not giving any long blast by whistle, and, therefore, those who represent the *Gladiator* are entitled to succeed in their argument only if they can shew that the omission to give such a signal did contribute to, if it did not actually cause, the collision, and in the attempt to shew that

C. A. 1908

THE ST. PAUL.

Kennedy L.J.

they have entirely failed, in my opinion, as they failed in the opinion of the President. In fact, the evidence of Captain Lumsden is this, that there was in his opinion, and I presume also in the opinion of the officer who assisted in the manœuvre of starboarding, an actual starboarding on the part of the vessel which was approaching. They do not say that if they had kept their course there would have been a collision; on the contrary, as I understand, the case put forward on behalf of the cruiser through the witnesses was that if nothing had been done the two vessels would have gone clear port to port; but it was thought by those on board the cruiser that they saw the *St. Paul* starboarding. They were not brought by the absence of a sound signal from the *St. Paul* into the position of difficulty—the position of those in charge of a vessel which unless they act will have a collision. The *Gladiator* was in the position of a vessel whose commander, having an opportunity of deciding, unfortunately decided wrongly to alter his own course in a certain direction, and so caused the collision. Whatever was the cause of the mistake, there was a mistake in fact. There was no starboarding of the *St. Paul*, and the error of those in charge of the *Gladiator* in thinking that there was, was the sole cause of the collision; and it was not an error induced or contributed to by the absence of the long blast signal. I agree also entirely with what the Lord Chief Justice has said with regard to the matter last mentioned in his judgment, as to the question of responsibility in regard to giving by sound signal an indication to a vessel approaching.

Appeal dismissed.

Solicitor for appellants (plaintiffs): *The Treasury Solicitor.*

Solicitors for respondents (defendants): *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A. 1908 Dec. 9.

In re LORD VIVIAN, PETITIONER, *v.* LADY VIVIAN, RESPONDENT.

Practice—Divorce—Variation of Settlement, Petition for—Petition served on Third Person, who has appeared and pleaded—Refusal to hear Person so served—"Person who may have any Legal or Beneficial Interest in the Property in respect of which the Application is made"—Procedure—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Divorce Court Rules*, *r.* 97.

The petitioner, having obtained a decree absolute for a divorce from his wife, presented a petition for variation of the settlement made on their marriage. By the settlement a fund brought into settlement by the appellant, the wife's mother, was settled upon trusts for the wife for life, and then for the husband for life, with the usual limitations in favour of children of the marriage, and, subject to the foregoing trusts, in trust for the appellant. There were two children of the marriage under age, of whom the petitioner had the custody. The petition for variation of the settlement prayed that the Court would direct the trustees to make to the petitioner during the joint lives of himself and his former wife certain annual payments out of the income of the trust funds, and to make such further order in the matter as might be just. The petitioner caused to be served with the petition, among others, the appellant, who appeared thereto and put in an answer, to which the petitioner put in a reply. Subsequently, when the matter came on for hearing before the registrar, the petitioner applied to him that the appellant should not be heard thereon, on the ground that she was not a person who had any legal or beneficial interest in the property in respect of which the application was made within the meaning of r. 97 of the Divorce Court Rules. The registrar acceded to that application, and on appeal the judge affirmed his decision. On appeal against the judge's order:—

Held that, the petitioner not having obtained any order dismissing the appellant from the proceedings on the petition, she was, as having been made a party thereto, entitled to be heard, and the order was therefore wrong and must be rescinded.

Quære whether the appellant was entitled to be made a party to the petition.

APPEAL from an order of Bargrave Deane J. affirming an order made by the registrar as after mentioned.

Under a marriage settlement made before the marriage of Lord and Lady Vivian in 1903, certain funds were brought into

C. A. 1908

VIVIAN (LORD) v. VIVIAN (LADY), *In re.*

settlement by Lady Vivian, and certain other funds, amounting to over 31,000*l.*, were settled by the appellant, Winifred McCalmont, who was the mother of Lady Vivian, the trusts declared as to the latter funds being for Lady Vivian for life, and, after her death, certain trusts for the benefit of Lord Vivian during his life, and, after the death of the survivor of Lord and Lady Vivian, the usual trusts for children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and, if there should be no child of the marriage who being a son should attain the age of twenty-one, or being a daughter should attain that age or marry, then that the trustees should stand possessed of the trust funds in trust for the said Winifred McCalmont. In addition Mrs. McCalmont covenanted to pay to the trustees of the settlement, upon trusts therein mentioned, 1000*l.* per annum during the joint lives of herself and Lady Vivian, and, if Lord Vivian should survive Lady Vivian, to pay to them yearly during her life, so long as Lord Vivian and any child or children of the marriage should be living and Lord Vivian should not have married again, the following sums, namely, while three such children were living, the sum of 1000*l.*, while only two such children were living, the sum of 750*l.*, and if only one such child should be living, the sum of 500*l.*

On December 17, 1907, Lord Vivian obtained a decree nisi for dissolution of the marriage, which upon June 29, 1908, was made absolute. There were two children of the marriage, of whom Lord Vivian obtained the custody. On July 10, 1908, Lord Vivian presented a petition for variation of the settlement under the Matrimonial Causes Acts, asking the Court to "direct the trustees to pay to the petitioner during the joint lives of himself and the respondent Lady Vivian out of the income of the trust funds the annual sum of 1250*l.*, and in addition thereto to pay 150*l.* per annum for each child of the marriage until such child should attain twenty-one, and then to pay the sum of 150*l.* per annum to each such child on attaining twenty-one, and to make such further order herein as may be just."

The petition was served upon the trustees and the appellant,

Winifred McCalmont, who thereupon appeared in the suit, and put in an answer to the petition on September 28, 1908, to which the petitioner put in a reply on October 20, 1908.

The matter of the variation of the settlement came before the registrar on November 3, 1908, when the appellant appeared by counsel, and no objection was taken to her appearance. On the appellant's application the registrar made an order for a further reply by the petitioner as to certain matters. The case came on again on November 13 before the registrar, when counsel for the petitioner took objection to the appellant's being heard in relation to the petition on the ground that she had no legal or beneficial interest in the property in respect of which the application was made within the meaning of r. 97 of the Divorce Court Rules. The registrar, being of opinion that this was so, refused to allow her to be heard. Upon appeal to Bargrave Deane J. against his order, the learned judge ordered that "the appeal summons against the refusal of the registrar to allow that Winifred McCalmont is entitled to be heard upon the petition for variation of settlements, &c., be dismissed," but gave leave to appeal. It appeared that, on making this order, the learned judge intimated that direction should be given to the registrar that the costs incurred by the appellant through her being made a party to the petition should be borne by the petitioner. No substantive application was ever made to dismiss the appellant from the proceedings on the petition as having been improperly made a party thereto.

Barnard, K.C. (*H. D. Grazebrook* with him), for the appellant. The appellant had an interest in the settled property within the meaning of r. 97 of the Divorce Court Rules and was therefore entitled to be made a party to the petition. In any case it was too late for the petitioner to take any objection to her locus standi to be heard on the petition. He had himself brought her in by serving her with the petition, and various steps had since been taken without objection on the footing that she was a party to the proceedings. She had appeared, and put in an answer, to which the petitioner had put in a reply; and she had applied for and obtained from the registrar an order for a further

C. A. 1908

VIVIAN (LORD) v. VIVIAN (LADY), *In re.*

reply by the petitioner. The terms of Order LXX., r. 2, which provides that "no application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity," may not be directly applicable, but it is submitted that, by analogy to its provisions, no order ought now to be made to prevent the appellant from being heard on the petition. The petition asks the Court not only to make certain allowances to the petitioner out of the income of the trust funds during the joint lives of the petitioner and Lady Vivian, but also "to make such further order herein as may be just"; and the jurisdiction of the Court under the Matrimonial Causes Act, 1859, s. 5, is not confined to the income of the settled property. [He cited *Wheeler* v. *Wheeler* (1); *Constantinidi* v. *Constantinidi*. (2)]

Rawlinson, K.C., and *Bayford*, for the petitioner. The appellant has no locus standi to be heard on the petition. She is not interested in the income of the trust funds to which the petition relates. The application contained in the petition really relates solely to the income of the trust funds during the lives of the petitioner and Lady Vivian, and there would be no jurisdiction under the statute to make any order upon the petition affecting the capital, or which could possibly affect the appellant's reversionary interest, an interest which only takes effect in the event of no child of the marriage attaining a vested interest. No Court could, or, even if they had the power, would, under the general words at the end of the petition, make any order such as to affect the appellant's interest in the capital. The appellant is therefore not a person who, within the meaning of r. 97 of the Divorce Court Rules, has either a legal or beneficial interest in the property in respect of which the application contained in the petition is made.

[VAUGHAN WILLIAMS L.J. It is difficult to see how it can be said that, as matters now stand, the appellant has no locus standi to be heard on the petition, she having been constituted a party by the petitioner himself, and having appeared and pleaded to the petition. Possibly it might have been competent for the

(1) (1889) 14 P. D. 154. (2) [1905] P. 253.

petitioner to make an application to dismiss her from the proceedings as having been improperly made a party thereto by mistake, on the terms of payment to her of all costs incurred by reason of that mistake, but this has not been done.]

It is submitted that in substance, though not in form, the application and order made that she should not be heard amount to the same thing as an application and order that she should be dismissed from the proceedings. Bargrave Deane J. intimated, when he made the order, that the registrar should be directed to allow to the appellant the costs to which she had been put in consequence of having been served with the petition. The petition could not affect the interest of a reversioner like the appellant. The term "interested" in the Divorce Court Rules means interested as between the parties concerned in the petition, i.e., the husband and wife and children of the marriage: see *Thomson* v. *Thomson*. (1)

[BUCKLEY L.J. On your construction of r. 97 the children would not be interested, because they have no interest in the income during the lives of their parents.]

They were interested in the matter of the petition because it was proposed that an allowance should be made for their benefit. The registrar would have power, if he thought the evidence of the appellant would afford any information material in the interests of the children, to cause her to be summoned as a witness on the petition, but she has no interest entitling her to be heard as a party.

Barnard, K.C., was not called on to reply.

VAUGHAN WILLIAMS L.J. In this case the application made to the registrar was that the appellant should not be heard, and, the registrar having granted that application, upon appeal to Bargrave Deane J., he ordered that the appeal against the refusal of the registrar to allow that the appellant was entitled to be heard should be dismissed.

The circumstances of this case, so far as material, are as follows. The petition for variation of the settlement was presented on July 10 1908. That petition was served upon,

(1) [1896] P. 263, at pp. 268, 269.

C. A. 1908

VIVIAN (LORD) v. VIVIAN (LADY), *In re.*

Vaughan Williams L.J.

amongst other persons, the appellant. An answer to the petition was put in by the appellant on September 28, 1908, and a reply to that answer was put in by the petitioner on October 20, 1908. During all this period the appellant was treated as a person having an interest in the matter of the petition and a locus standi to be heard in relation thereto. It is now said that she has no such interest and is not entitled to be heard. I suppose that those who originally caused her to be served with the petition thought that she had, or might have, an interest in the matter such as would entitle her to be heard; and it is to be observed that the petition, after asking for an order for payment to the petitioner of certain specific annual sums, the amount of some of which would depend upon the number of children of the marriage, concludes with a request to the Court to "make such further order herein as may be just." It was said that the only possible order which could be made on such a petition was one which affected income only. I do not agree that, so far as the words either of the Matrimonial Causes Act, 1859, s. 5, or of r. 97 are concerned, the powers of the Court are limited to income. Sect. 5 of the Matrimonial Causes Act, 1859, provides that "the Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit." There is no limitation there to income. The words used are "property settled," not "income of property settled." Similarly when r. 97 is looked at, it provides as follows: "A certified copy of such petition, under seal of the Court, shall be personally served on the husband or wife (as the case may be) and on the person or persons who may have any legal or beneficial interest in the property in respect of which the application is made, unless the judge ordinary on motion shall direct any other mode of service, or dispense with service of the same on them or either of them." There again the expression used is "property," not "income of property."

Under these circumstances the petitioner has chosen to file a petition which concludes with the words to which I have referred, and which are wide enough to cover any order which the Court might think fit to make in the exercise of the powers given to it under s. 5 of the Matrimonial Causes Act, 1859, and the Rules. Under the circumstances it appears to me that the application that the appellant should not be heard, she being really a party to the proceedings on the petition, was a wrong application to make. I think, notwithstanding what has been said by the petitioner's counsel, that the order of the registrar was really an order that the appellant should not be heard, and the order of the learned judge was merely an order that the registrar's order should be affirmed. Now, under the circumstances, what was the right order to make? In my judgment, before the petitioner could be in a position to make an application that the appellant should not be heard, it was his duty to take out a summons to alter her position and get her dismissed from the proceedings on the petition. It appears to me plain that if he was entitled to have that done—which I do not wish to be considered as deciding—the proper course would have been to make some application to the effect that she should be dismissed from and should no longer be a party to the proceedings, on the terms that the petitioner should pay all costs incurred by her through her having been served with the petition, including the costs of the answer delivered by her and any affidavits filed by her, and any other costs with which her solicitors were entitled to charge her in respect of the proceedings, as between solicitor and client. No application of that kind was made. It was said that Bargrave Deane J. intimated, at the time of making his order, an opinion that the appellant ought to have these costs. That may be so, but no such application as I have referred to has been made. I do not know any reason why such an application should not have been made before the registrar was asked to make an order that the appellant should not be heard. The question has been treated in argument as one of jurisdiction. In my judgment, the appellant once being before the Court as a litigant, and being willingly there at the time when the application to the registrar was made, no question of jurisdiction could really

C. A. 1908

VIVIAN (LORD) v. VIVIAN (LADY), *In re.*

arise. The petitioner had brought her before the Court as a party, and on previous occasions she had taken part in the proceedings without objection, and she took no objection to being a party to them. For these reasons I think the order made was wrong and this appeal should be allowed.

BUCKLEY L.J. On June 29, 1908, Lord Vivian obtained a decree absolute for dissolution of the marriage between himself and Lady Vivian. There were two children of the marriage, who were of tender years, and of whom he had the custody. On July 10, 1908, he presented a petition under the Matrimonial Causes Acts of 1859 and 1878 for variation of the marriage settlement, asking the Court to direct that the trustees should pay to him out of the income of the trust funds, during the joint lives of himself and Lady Vivian, an annual sum of 1250*l.*, and, in addition thereto, pay 150*l.* per annum for each child of the marriage, until such child should attain the age of twenty-one, and then pay the sum of 150*l.* per annum to each such child on attaining twenty-one, and "to make such further order herein as may be just." The appellant is the mother of Lady Vivian. She had brought into settlement, at the time of the marriage, funds amounting to more than 31,000*l.*, the trusts declared in respect of which were for the wife for life, then for the husband for life, and then the usual trusts in favour of children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and, subject to those trusts, that the trustees should stand possessed of the funds in trust for the appellant absolutely. She therefore had a reversionary interest in the trust funds, expectant upon the determination of the interests of the husband and wife and of their children. A copy of the petition for variation of the settlement was served on, amongst other persons, the appellant. On September 28, 1908, she put in an answer to the petition. On October 20 Lord Vivian put in a reply to that answer. On November 3, on the application of the appellant, the registrar ordered Lord Vivian to make a further reply as to certain matters. Subsequently an application was made to the registrar that the appellant should not be heard on the petition,

and an order was made to that effect. To my mind that order was wrong. The petitioner had himself made the appellant a party by serving her with the petition, and she had appeared and put in an answer, to which the petitioner had delivered a reply. Under those circumstances, on common principles of justice she was entitled, as matters stood, to be heard. It was argued that, in substance, the application was of a different description from that which in form it purported to be, and amounted to an application that the appellant should be discharged from the proceedings; and that an order might be made analogous to the order which may be made in the case of a defendant in an action, staying further proceedings against that defendant on payment of costs. The answer is that that is not the application which was made in the present case. If that application were made, other matters might come into consideration which do not, I think, now arise.

Having said thus much, I wish to say something with regard to the terms of r. 97, because I think the petitioner's contention upon it was wrong. By the terms of that rule the petition is to be "served on the husband or wife (as the case may be) and on the person or persons who may have any legal or beneficial interest in the property in respect of which the application is made." Assuming the settled property to be Consols, I understand those words to mean "any person or persons who may have any legal or beneficial interest in the" Consols. "The property" in the rule does not, in my judgment, mean the successive limited interests in the property, but the property itself. The appellant was, I think, a person interested in the property in that she had a reversionary interest expectant upon the limited interests which preceded hers. It does not follow that a person having such an interest ought in every case to be brought before the Court on a petition for the variation of settlements. If, as is said here, and said, perhaps, truly in one sense, the application affected income only during a period when the person served with the petition had no interest in it, so that the application did not affect her, that might, possibly, be a proper case for contending that really she was a person who had no such interest as to render it right that she should be served, and that

C. A. 1908

VIVIAN (LORD) v. VIVIAN (LADY), *In re.*

Buckley L.J.

service ought to be dispensed with. But the view of the rule suggested by the petitioner's counsel seems to me to be perfectly inadmissible. Could it be said that the children had not an interest in the property, because the application was one dealing with the income during the tenancies for life which preceded their interest? Certainly they had an interest in the property, but not because, as was suggested in reply, they were going to get an interest under the order for which application was made. That is not the question. The question is whether at the time when the petition is presented they have or have not an interest which entitles them to be served.

It seems to me that, under the circumstances, the appellant must prima facie be taken to have been properly served in the first instance; in that state of things proceedings go on under which she is constituted an effective respondent to the petition, and therefore a person entitled to be heard. The only question now before us is whether the order that she be not heard was right or not. In my opinion that order was wrong. Our present order will not preclude a subsequent application of a different kind, namely, an application to dismiss the appellant from the proceedings on the ground that she ought not to be a party to them; but I am far from saying—as will follow, I think, from what I have said—that an application of that kind would succeed. Such an application is one which would require to be very carefully scrutinized before it was acceded to. I think the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Chester & Co.*
Solicitors for petitioner: *Hasties.*

E. L.

CHETTI (VENUGOPAL) *v.* CHETTI (VENUGOPAL).

1908

Nov. 13, 14; *Dec.* 8.

Marriage—Validity—Celebration in England—Husband a British Subject domiciled in India—Hindu—Personal Capacity to contract Marriage with an English Christian Woman.

Any incapacity of either a man or a woman, which, though recognized and enforced by the law of the domicil of either, is of a kind to which the Courts of this country refuse recognition, does not render a marriage celebrated here invalid on account of any such incapacity.

A foreigner or a British subject domiciled abroad who enters into a contract of marriage with an Englishwoman domiciled in England—a marriage which would be recognized by the law of England as valid if contracted between persons domiciled in this country—does not carry with him any disability of a personal character imposed by the law of his domicil so as to preclude him from contracting a valid marriage with her in this country.

A foreigner or a British subject domiciled abroad, who, being in England, contracts in due form according to the laws of England a marriage with a person domiciled in England, is not to be permitted to assert that he was under the burden of an incapacity, imposed by the law of the foreign domicil, to do that which he in fact did voluntarily and in due form according to the laws of England, and he cannot repudiate the marriage on the ground of such personal incapacity.

Where both parties to a marriage are domiciled in a country the laws of which forbid them to marry, considerations may apply differing from those which would be applicable in cases where one party only is domiciled in a country the laws of which forbid such a marriage.

This was a petition by the wife, Louie Venugopal Chetti, praying for a judicial separation on the ground of desertion. The petitioner, an Englishwoman, was married to the respondent on September 1, 1890, at a registrar's office in London, the respondent being a Hindu then temporarily resident in this country, but at the time of the presentation of the petition being permanently resident and domiciled at Chingleput, in the province of Madras, in the Empire of India. After the marriage the parties cohabited in England, and a child was born on September 16, 1890, the only issue of the marriage. In October, 1890, the respondent returned to India, and the parties never again cohabited.

A correspondence ensued and remittances were made, though somewhat irregularly. The earlier correspondence seemed to

1908

CHETTI v. CHETTI.

shew an intention on the part of the respondent that his wife should join him in India, but the Court found as a fact, upon the evidence and correspondence, that the respondent, about the year 1894 and thereafter, intended to desert the petitioner.

The respondent filed an answer denying the legality of the marriage and alleging that at the time of its celebration and at all material times since then he was and remained a Hindu domiciled in India. He also pleaded that by Hindu religion and law, which was his personal law as well as the law of his domicil, he could not marry any one outside his own caste or who was not by religion a Hindu; moreover, that by Hindu law plurality of wives was permissible; that he was not guilty of desertion as alleged in the petition; and that, although temporarily resident in England at the time he was served with the citation, he was not then or at the date of his answer domiciled in England, his permanent residence being at the address given in his answer, namely, in Madras.

The petitioner, in her reply, alleged that the answer of the respondent was not in law any defence to her petition.

Hume Williams, K.C., and *Willock*, for the petitioner. The onus lies on the respondent to shew that the marriage which was in fact celebrated between himself and the petitioner is invalid.

Barnard, K.C., *De Gruyther*, K.C., and *Bayford*, for the respondent. There is no case on all fours with this. There was no consent here to a Christian marriage, that is, "a voluntary union for life of one man and one woman to the exclusion of all others": *Hyde* v. *Hyde*. (1) The only distinction between that case and this is that, there, the ceremony of marriage was performed in a country where polygamy was lawful. But that makes no difference if there was no agreement for life of the one man and one woman to the exclusion of all others: *Bethell* v. *Hildyard*. (2) The case then comes very near to *Ford* v. *Stier* (3), where the lady said she did not know she was going through a ceremony of marriage and thought it was only one of

(1) (1866) L. R. 1 P. & M. 130, at p. 133.

(2) (1888) 38 Ch. D. 220.

(3) [1896] P. 1.

betrothal. The respondent cannot, having regard to his personal law, be held to have consented to this alleged marriage; as a Hindu, his personal law attaches to him wherever he goes: Westlake's Private International Law, 4th ed. p. 59; *In re Cooke's Trusts* (1); *Brook* v. *Brook* (2); *Mette* v. *Mette* (3); *Ogden* v. *Ogden*. (4)

[SIR GORELL BARNES, PRESIDENT. The argument appears to me to be a mediæval one. This country, differing in that respect from other countries, has repudiated the doctrine you are contending for, that a man carries about with him his own personal law. I am bound by the second decision in *Sottomayer* v. *De Barros* (5), where one of the parties was domiciled in England, and the President (Sir J. Hannen) expressly held that the marriage was good. There is only one possible distinction: that was a case of a man being domiciled here, whereas this is the case of the woman being domiciled here. In the case of a man going through a ceremony of marriage with a woman and living here for a number of years, and having children by her, would you say that the law of his domicil must still apply in determining any question as to the validity of the marriage?]

The respondent would go further and say that if a man had lived and died here, and left personal property here, any question as to that property would be determined by the law of his domicil, and the question whether persons are legitimate or not must be determined by the law of their domicil and not by the law of this country. *Simonin* v. *Mallac* (6), so far as it relates to this point, was not affirmed by the Court of Appeal in *Sottomayor* v. *De Barros*. (7) The respondent's incapacity is not a statutory one merely; it is the very essence of his religion and domicil. Professor Dicey (8) questions the authority of the second decision in *Sottomayer* v. *De Barros* (5) and, commenting on that case and the decision in *Mette* v. *Mette* (3), says: "From the principle that capacity depends on the law of a person's domicile

(1) (1887) 56 L. J. (Ch.) 637.
(2) (1861) 9 H. L. C. 193.
(3) (1859) 1 Sw. & Tr. 416.
(4) [1907] P. 107; [1908] P. 46.
(5) (1879) 5 P. D. 94.
(6) (1860) 2 Sw. & Tr. 67.
(7) (1877) 3 P. D. 1.
(8) Conflict of Laws, 2nd ed. p. 633.

1908

CHETTI v. CHETTI.

it would seem to follow that the disability of either party, under the law of his or her domicile, to contract a marriage with the other, invalidates the marriage. A suggestion has however been judicially made that the application of the principle should be limited, at any rate as regards marriages celebrated in England, to cases in which both of the parties are domiciled in a country by the laws of which they are incapable of intermarriage." In *Mette* v. *Mette* (1) the marriage was held bad on the ground that the Court had not to look at the place where the marriage was contracted, but had only to look at the law of the domicil of the husband. In the case of *In re Cooke's Trusts* (2), which was a case of an ante-nuptial contract between an Englishwoman and a Frenchman, the Englishwoman having her domicil in England while the Frenchman was domiciled in France, and the contract being made in France, it was held that the contract made by the lady, though made in France, must be determined by the law of her domicil.

[SIR GORELL BARNES, PRESIDENT. Is not that a totally different case to this? The French Courts would have held it valid. England and the Continent always approach these questions from different points of view. In ancient days people were considered to travel about with their own nationality, but you cannot find a trace of that in England in recent times, and we hold here that if a man comes here he is to be governed by the law here. If a man makes a contract between the ages of twenty-one and twenty-five, good by the law here but bad by the law of France, would our Courts listen to an argument that he was incapable of making a contract by reason of his being under the age of twenty-five? Suppose this marriage were good and the lady possessed real estate?]

The capacity to marry is to be determined by the law of the domicil. The law of real property stands on an entirely different footing. The question of divorce is wholly governed by the law of the domicil.

[SIR GORELL BARNES, PRESIDENT. I know that is accepted law, but when I was dealing with *Ogden* v. *Ogden* (3) I suggested

(1) 1 Sw. & Tr. 416. (2) 56 L. J. (Ch.) 637.
(3) [1907] P. 107.

that it might be too widely stated. The point was this: that if the woman was domiciled in England and married a person domiciled in France, the Courts of whose country declared, as in that case, that there was no marriage, this Court, in dealing with the question of divorce, might say in effect, We must free you from a tie which your own country says was no marriage. This may some day prove a possible exception to the statement that the law of the domicil alone applies to a case of divorce, so that the Court may be enabled to grant a divorce in a case where the wife was domiciled in this country, which recognizes the marriage, but where the law of the husband's domicil does not.]

In the case of *In re Goodman's Trusts* (1), the question being who were the next of kin, it was held that the law of England was that you should apply to questions of legitimacy the law of the domicil of the person, and if you applied that, the children were legitimate. If you applied the law of England the children were absolutely illegitimate. That seems an extreme case. The law for purposes of determining the legitimacy of children is the law of the domicil.

Professor Dicey (2) says: "A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or of either of the parties, is of a kind to which our Courts refuse recognition." The question here is whether our Courts will refuse to recognize a matter which applies to three hundred millions of British subjects.

Suits for judicial separation are governed by the Matrimonial Causes Act, 1857 (3), s. 22. The Ecclesiastical Courts would only deal with questions arising between persons who were both of them Christians.

[SIR GORELL BARNES, PRESIDENT. We are not now dealing with a religious marriage. This was a marriage before a registrar.]

The decision of Dr. Lushington in *Ardaseer Cursetjee* v. *Perozeboye* is in point. (4)

(1) (1880) 14 Ch. D. 619; reversed (1881) 17 Ch. D. 266.

(2) Conflict of Laws, 2nd ed. p. 634.

(3) 20 & 21 Vict. c. 85.

(4) (1856) 10 Moo. P. C. 375, at p. 415.

1908

CHETTI v. CHETTI.

[SIR GORELL BARNES, PRESIDENT. But I could not be expected in every case to inquire what the religion of the parties to the marriage was.]

The true rule is that the law of the domicil ought to govern not only the rights of the parties, but the relief and redress.

[SIR GORELL BARNES, PRESIDENT. You are ignoring the conflict of laws. The proposition amounts to this, that this Court has no jurisdiction over a marriage unless it is valid according to the law of the domicil of both the parties. Suppose the man met the woman in the street here and began knocking her about, this Court would afford her protection. That principle was decided in *Armytage* v. *Armytage* (1), where, although this Court could not have granted a divorce, it gave the wife the protection which she needed.]

Hume Williams, K.C., in reply. There is practically no distinction, in law, between this case and that of *Sottomayor* v. *De Barros.* (2) There is evidence that, upon a declaration that this marriage is valid here, it would also be recognized as valid and binding in India. Each Government ought to recognize all marriages solemnized and accepted as binding within the territorial limits of the other Government.

Cur. adv. vult.

1908. Dec. 8. SIR GORELL BARNES, PRESIDENT, after an exhaustive review of the evidence bearing on the plea of desertion, found as a fact that the charge was proved, assuming that a valid marriage were established, and proceeded as follows: Having now dealt with those questions which are more particularly questions of fact, I will proceed to deal with the law applicable to this case. The position of the respondent is that of a Hindu domiciled in India and belonging to the Vaisya caste. It is not necessary that I should attempt to trace the origin and development of the caste system, or the usages and customs thereof; such an attempt would be beyond the powers of one not familiar with India and the customs there. The subject may be studied in a number of works, amongst which reference may be made to Mr. Mayne's Treatise on Hindu Law and Usage,

(1) [1898] P. 178. (2) 3 P. D. 1; 5 P. D. 94.

7th ed. (1906), and to the Lectures on the Hindu Law of Marriage and Stridhan by Gooroodass Banerjee, Tagore Law Professor (1879). It is sufficient for the purposes of this judgment to state that the caste system prevails amongst the Hindus; that there are three "regenerate" or "twice-born" castes, and also the Sudra caste, and that there appear to be other inferior castes; also that the evidence given in the present case is to the effect that according to Hindu law and usage a Hindu cannot marry a woman who does not belong to the same caste as himself, and that it is competent for a Hindu member of a caste to marry a plurality of wives. I note also that Mr. Mayne in his treatise, after stating (s. 88) that "the prohibition against marriages between persons of different castes is comparatively modern," says (s. 89): "Marriages between persons of different classes are long since obsolete. No doubt from the same process of ideas which has split up the whole native community into countless castes, which neither eat, drink, nor marry with each other. It is impossible now to say when mixed marriages first became extinct"; and (s. 92) "It is now quite settled in the Courts of British India that a Hindu is absolutely without restriction as to the number of his wives, and may marry again without his wife's consent, or any justification, except his own wish."

The recognition accorded to the Hindu laws and usages in British India may, so far as the researches which I have been able to make enable me to state, be gathered from certain statutes, charters, and regulations, an account of which, up to 1850, is to be found in Morley's Analytical Digest. (1) A summary of these is also given by Sir Courtenay Ilbert, K.C.S.I.(2), and to some of these counsel have, since the hearing, sent me a reference. The question of the law to be applied to natives appears to have first assumed a practical form when Warren Hastings became Governor-General of Bengal; and in the year 1772, early in the stirring times of his governorship, he laid down his celebrated plan for the administration of justice in the interior of Bengal. With respect to civil rights that plan, by its 23rd rule,

(1) Introduction, p. 69.

(2) "The Government of India," ed. 1898, p. 387 et seq.

1908

CHETTI v. CHETTI.

The President.

directed that "in all suits regarding marriage, inheritance, and caste and other religious usages and institutions the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to Gentus (Hindus) shall be invariably adhered to." This was followed up by the Regulating Act of 1773 and the regulations thereunder, and the English Act of 1781 (1) and other statutes. For Madras provision was made at different times by the statutes relating to the Recorder's Court (2), which was superseded by the Supreme Courts, and now by the High Courts (3), and the regulations and charters thereunder (4), and the Madras Civil Courts Act, 1873 (5), which deals with the Civil Courts of the Madras Presidency subordinate to the High Court.

Sect. 16 of this Act is as follows: "Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution:—(*a*) the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, or, (*b*) any custom (if such there be), having the force of law and governing the parties or property concerned, shall form the rule of decision, unless such law or custom has by legislative enactment been altered or abolished. (*c*) In cases where no specific rule exists, the Court shall act according to justice, equity, and good conscience."

The Caste Disabilities Removal Act, 1850 (6), may also be referred to. It declares that "so much of any law or usage now in force within the territories subject to the government of the East India Company as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal charter within the said territories."

(1) 21 Geo. 3, c. 70; see especially ss. 17 and 18.

(2) 37 Geo. 3, c. 142; see especially ss. 12 and 13.

(3) 39 & 40 Geo. 3, c. 79; 4 Geo. 4, c. 71; 24 & 25 Vict. c. 104.

(4) Regulation 3, and Charter of 1865, clauses 19 and 20.

(5) Act III., 1873.

(6) Act XXI., 1850.

The result is that within the domain of family law Hindus retain their laws of marriage and certain other matters not material to refer to; but I am not concerned in the present case with any question as to marriage relationship entered into in India, nor to what extent Hindu marriages in India would be recognized outside that country. I have merely to deal with the effect, if any, of the respondent's condition on a marriage which he, a British subject, chose voluntarily to enter into in England with the petitioner, who was domiciled here.

Now, changes would seem to be occurring, tending to relax some of the strict rules of caste; for it appears from the evidence of a relative of the respondent, who was examined in India on commission, that the going of a Hindu to England might formerly have been prohibited (I understand this to mean by the usages and customs of his caste), but that there is no such restriction or prohibition now, and, further, the following passage occurs in the evidence of this witness:—"In former days it was prohibited to go on board ship; even if a man went on board ship in former days a regular 'prayaschitta' would have to be performed. It has become usual now to go on board ships. There is no prohibition now. I don't know when the change took place. I have heard that it used to be necessary to perform 'prayaschitta' after going on board ship, but I have not known of it of my own knowledge, and I know of no instance of 'prayaschitta' being performed because a person went a voyage in a ship. I have only heard of the rule. I did not look into the Shastras. There is no such rule now. I don't know if that rule was changed or by whom. There has been no caste meeting to discuss the question of crossing the sea. I am forty-four years of age. More than fifteen years ago there were three of my relations who crossed the sea—about twenty years ago—they were three sons of Mr. P. Ramasammy Chetty. I don't know of any other persons at all who went more than twenty years ago." Still I understand that while the respondent remains a member of his caste he cannot, in India, according to Hindu law and the usage of his caste, marry a woman out of his caste; but I cannot find anything in the laws to which I have made reference, nor in the evidence in this case, to shew that he

1908

CHETTI v. CHETTI.

The President.

is prevented from renouncing or being deprived of his caste, or becoming of another faith. This, I think, it may be gathered from the evidence, may be done or happen. (1) I notice further that Mr. Mayne states (2), "Where a Hindu has become converted to Muhammedanism he accepts a new mode of life which is governed by a law recognized and enforced in India," and that in the case of *Abraham* v. *Abraham* (3), in dealing with the status of a Hindu who had become converted to Christianity, Lord Kingsdown in giving judgment said: "He becomes, (as their Lordships apprehend), at once severed from the family and regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, (as it seems to their Lordships), be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, (as their Lordships think), equally be put an end to by a severance which the Hindu law recognizes and creates. Their Lordships, therefore, are of opinion that upon the conversion of a Hindu to Christianity the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion."

There are, no doubt, many faiths in India, and there would appear to be no prohibition against a Hindu joining any other faith or abandoning his position as a member of a Hindu caste. I may here notice that this case was argued upon the assumption that the respondent still remained a member of his caste. There is no doubt that he has not, according to the evidence, married again; but there is really no proof in the course of the evidence of what would have occurred if the marriage in question in this case had been generally known, and what effect it would have had upon his position as a member of his caste. I gather from the evidence that he did not divulge the fact that he had gone

(1) See also Act XXI., 1850.

(2) Mayne's Hindu Law and Usage, 6th ed., s. 57.

(3) 1863) 9 Moo. Ind. Ap. 195, at p. 237.

through the ceremony of marriage in England after his return to India, although he states that his parents came to know of it some years afterwards, in 1895; but it does not appear that anybody else knew or was informed, and there is a significant answer given by the relative to whose evidence I have already referred, who stated that the respondent did not tell him that he had gone through a form of marriage in England. The question was asked, "Suppose you had known when he returned to India that he had cohabited with an Englishwoman whilst in England, would that have made any difference in your treatment of him?" (Answer) "We would not have so much noticed it if he had only cohabited with or kept an Englishwoman." It is very unsatisfactory that the evidence should have been left without any distinct statement of the respondent's position if it had been known on his return that he had in fact entered into the matrimonial alliance which the petitioner asserts.

Then, again, the evidence to which reference has been made shews what is probably a matter of common knowledge, that it is only in comparatively recent years that Hindus have left their country, voyaged to England, and had opportunities of dealing and entering into relationship with persons outside India; and the recognition afforded to Hindu law and usage in India can hardly have had in contemplation cases in which a Hindu's actions requiring consideration took place outside India, nor is there anything in the legislation aforesaid which shews that rules of life and conduct which would be applicable to him in India are to be held by the Indian Courts to be applicable to him in his dealings in another country with an inhabitant thereof. I may here notice that the Indian Christian Marriage Act, 1872 (1), which provides for the solemnization of marriages in India between persons one or both of whom is or are a Christian or Christians subject to the formalities and conditions prescribed by the Act, but which enacts (2) that the Act is not to be deemed to validate any marriage which the personal law applicable to either party forbids him or her to enter into, only applies to marriages contracted in India.

(1) Act XV., 1872. (2) Sect. 88.

1908

CHETTI v. CHETTI.

The President.

It results from what I have been stating that what is set up by the respondent is not a general disability because of being domiciled in India—that is to say, not a disability grounded on the fact that he is a domiciled Indian and is governed by a general law which deals with all the inhabitants of India, as in the cases where foreign laws have had rules as to consanguinity differing from those prevailing in this country, of which the case of *Sottomayor* v. *De Barros* (1) is an illustration—but what is relied upon by the respondent is in the nature of a religious disability which in principle differs little, if at all, from that of the priest referred to by the late Lord Hannen in his judgment in that case.

There is not, in truth, a disability by the laws of his domicil which cannot be got rid of at the will of the respondent, and there seems to be no status, of which notice can be taken in this country, creating an incapacity to enter into a marriage contract in this country. I may refer, while dealing with this part of the case, to the old statement with regard to religious disabilities (2), "Of foreign professions (that is religious) the common law taketh no knowledge."

Then, is it clearly proved by the evidence that this marriage would not have its validity recognized at all in India, and would therefore be declared invalid if held valid in this country? After the most careful study of the whole of the evidence of the witnesses who spoke as to the law (which evidence is not very exhaustive) I am not able to find as a fact that this is clearly proved.

Sir Vembaukam Bhashyam Ayyangar, C.I.E., who was the acting Advocate-General of Madras, and formerly a judge of the Madras High Court, gives evidence as follows:

Q. "According to the law administered in British Courts in India, can a Hindu who belongs to one of the four castes mentioned in the previous question lawfully marry a woman who does not belong to his own caste?"

A. "According to the ancient Hindu law a Brahmin could marry a woman of the Kshatriya or Vaisya caste and possibly of the Sudra caste also, and a Kshatriya could marry a woman of

(1) 3 P. D. 1; 5 P. D. 94. (2) Co. Litt. 132 b.

the Vaisya caste or of the Sudra caste, and a Vaisya could marry a woman of the Sudra caste, but that has been obsolete for a long time, and according to the Hindu law and usage now in force a Hindu cannot marry a woman outside his own caste."

Q. "According to the Hindu law as administered by the British Courts in India, can a Hindu who belongs to one of the aforesaid four castes lawfully contract a marriage in India with a Christian woman?"

A. "Certainly not."

Q. "Would a ceremony of marriage gone through in England or anywhere outside India between a Hindu male of one of the aforesaid four castes and a Christian woman be held to be a valid marriage by the Courts in British India?"

A. "If the question that arises in a Court in British India be, whether that ceremony would constitute a valid marriage under the Indian common or statutory law, the Court would hold that it did not constitute a valid marriage; but if a question should arise in a British Indian Court as a question of foreign law of the place where the ceremony purporting to be a ceremony of marriage was gone through (a question which would have to be proved in the Indian Court as a question of fact), the Indian Court would hold the intended marriage either as valid or invalid according to the foreign law as proved; but the Court will not recognize such a union as constituting a valid marriage for its enforcing any marital rights as between the Hindu male and the Christian woman who have gone through the ceremony of marriage in a foreign country, though according to the law of such foreign country the union would constitute a valid marriage."

Q. "Do I understand you to say that if for any purpose a Court in British India has to consider the question whether such a ceremony of marriage constitutes a valid marriage according to the law of the place where it was solemnized, that question will be decided according to that law to be proved as a question of fact?"

A. "Yes; as I have already stated in my answer. . . . . According to the Hindu jurisprudence there is no such thing as lex situs or lex loci and all law is personal which follows the person

1908

CHETTI v. CHETTI.

The President.

wherever he goes until he may choose to adopt and follow some other personal law."

It is true that elsewhere in his evidence there are certain passages which may qualify what is stated in these answers, but I am unable to satisfy myself, either from that evidence or from the evidence given by Mr. Jardine, K.C., who was called as a witness at the trial, that the marriage is clearly proved to be one which would be treated as invalid in India if held to be valid here.

I have taken the following questions and answers from the shorthand notes of the evidence of Mr. Jardine.

Q. "Do you agree, if an English Court held such a marriage to be valid in England, that an Indian Court would consider it valid also?"

A. "That is so, in my mind; if the English Court said it was valid so far as England is concerned, that the Indian Court would accept that for what effect it might have, that the marriage was a valid marriage; and I think no person under these circumstances would attempt to enforce marital rights."

Q. "The question was, would such a marriage be held to be valid in India? If the English Court held it to be a valid marriage, and that was proved as a matter of fact, would the Indian Court come to the same conclusion?"

A. "I hardly think it would run to that quite. I think the Indian Court would consider it a valid marriage, and would give effect, as far as it could, to the English decision and find the marriage valid, but without enforcing marital rights."

Although this is not the whole of the evidence of Mr. Jardine, I remain of the same view after studying all the evidence which he gave. A question such as that raised in this case has never, as I gather, been raised in the Courts of India; and any evidence given appears to me to be a matter of opinion, even if it amounts to a statement that the marriage would be treated as invalid in India if held valid here. Upon the evidence, therefore, I am unable to find as a fact that the law in India is in favour of the respondent on this point, nor can I find any sufficient reason given, or principle stated, from which it should follow that the Courts of India would apply Hindu law and usage to a case such

cf. Pugh v. Pugh: why did English Law apply when the man acted in defiance of English law outside England?

as this where the respondent has acted, not in India, but in England, in defiance of such law and usage.

But even supposing it to be the law of India that this marriage, though binding in this country, would not be regarded as binding in India, it remains to be considered what is the correct view of the law of England with regard to the validity of the marriage. The argument which counsel for the petitioner addressed to me may perhaps be taken as summed up by Mr. Bishop (1) thus: "The Result. — These processes of reasoning, it is submitted, conduct us again, by other steps, to the conclusion first drawn; namely, that each government ought to accept of all marriages celebrated within the territorial limits of other governments, whether such as itself approves or not, and whether between its own citizens transiently there, or between others, as good and lawful. There is no ground but this on which conflicts can be avoided. Otherwise we have the unseemly spectacle of the same persons differently mated in marriage in different countries,—a spectacle abhorrent to the natural feelings of pure minds, and corrupting to all." The author is, no doubt, in this passage referring to marriages recognized by Christendom, and he does not there deal with exceptions such as polygamous or incestuous marriages, &c., which he discusses further on in his work.

Counsel for the respondent, on the other hand, supported his argument by reference to Professor Westlake's treatise on Private International Law (2), which is as follows: "It is indispensable to the validity of a marriage that the personal law of each party be satisfied so far as regards his capacity to contract it, whether absolute, in respect of age, or relative, in respect of the prohibited degrees of consanguinity or affinity." The learned author refers to certain cases in his note to that section, but they do not appear to me to support his proposition to an extent sufficient to cover the present case. The principal cases mentioned by him are *Brook* v. *Brook* (3), *Mette* v. *Mette* (4), and *Sottomayor* v. *De Barros*. (5) The two former were cases of marriages

(1) Law of Marriage and Divorce, 6th ed., vol. i., s. 360.
(2) Sect. 21.
(3) 9 H. L. C. 193.
(4) 1 Sw. & Tr. 416.
(5) 3 P. D. 1.

1908

CHETTI v. CHETTI.

The President.

contracted out of England, and in one of which both parties, and in the other one party, were held to have owed obedience to the statute of William IV. (1), and to have been unable to contract marriage in contravention thereof, though such marriage might have been valid in the country of celebration. The real ground of the decisions in those cases may perhaps be stated from the speech of Lord Campbell, the Lord Chancellor (2), where he says: "My opinion in this case does not rest on the notion of any personal incapacity to contract such a marriage being impressed by Lord Lyndhurst's Act on all Englishmen, and carried about with them all over the world, but on the ground of the marriage being prohibited in England as 'contrary to God's law.'"

These two cases were not looked at from the point of view of the Courts of the country of celebration; the marriages might have been valid in that country. Moreover, there is likely to be some confusion if this is not borne in mind, that where the judgments speak of essentials and forms, those who decided these cases were looking at them from an English standpoint; but it may be observed that what may be regarded as form in this country might in a foreign country be regarded as an essential; for instance, in the cases of *Simonin* v. *Mallac* (3) and *Ogden* v. *Ogden* (4), the French Courts held the marriages in those cases invalid for defect in what in this country is regarded as a matter of form, and in this country the marriages in both those cases were held valid. The difficult position in which the wife was placed in each of those cases was the result of a conflict of law on a matter of form.

The third case above referred to, namely, that of *Sottomayor* v. *De Barros* (5), was a case in which, on the facts presented to the Court of Appeal, both parties were domiciled abroad and could not intermarry according to the law of their domicil unless they obtained a Papal dispensation; but, when that case came on for further ascertainment of the facts, it was found that the petitioner was domiciled abroad and the husband was domiciled in this country, and the marriage was supported by that eminent

(1) 5 & 6 Will. 4, c. 54.
(2) 9 H. L. C. 193, at p. 214.
(3) 2 Sw. & Tr. 67.
(4) [1908] P. 46.
(5) 3 P. D. 1.

judge the late Lord Hannen. I think it is obvious from a perusal of his judgment (1) that the decision of the Court of Appeal, though binding upon him, was not in accordance with his views; and it may be noticed that that decision was discussed in the recent case of *Ogden* v. *Ogden* (2), and is considered by Mr. Bishop contrary to the old ideas of the supremacy of English law on English soil. It may possibly be said that different considerations apply where both parties to a marriage are domiciled in a country where the laws forbid their marriage, though it would be valid if they were domiciled in the country of the celebration, to those which should be applied where one party is domiciled in the country which forbids the marriage and the other in the country of celebration which allows it, and that, whatever may be thought of the theoretical proposition upon which the Court of Appeal acted, they guarded themselves from being considered as indicating that it was applicable to the latter case, for they expressly stated (3): "Our opinion on this appeal is confined to the case where the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognize the laws of a foreign State when they work injustice to its own subjects; and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognized by the law of this country." The learned author, Mr. Westlake, whose treatise is above mentioned, himself gives qualifying statements in ss. 22 and 16 of that work, for in s. 22 he states that an incapacity to marry of a penal nature, or resulting from religious vows or orders, will not be admitted in England on the ground of the personal law, in consequence of the doctrine stated in s. 16; and in s. 16 he expresses himself thus: "An incapacity existing by a foreign law of a penal or religious nature, or so opposed to British principles, as, for example, is slavery, will be disregarded in

(1) 5 P. D. 94. (2) [1908] P. 46.
(3) 3 P. D. 1, at p. 6.

1908

CHETTI v. CHETTI.

The President.

England." Further, it may be observed that in s. 23 he treats consent of parents or guardians as a matter of form only, when by his personal law a party may in some form or other marry without such consent, though such a distinction was not really the ground of the decision in the case of *Simonin* v. *Mallac* (1), which was dealt with on the broad ground that by the decree of the French Court the marriage was void, and the question considered was whether the marriage was to be judged of in England by the laws of France or by the law of England. In s. 25 he expresses himself to the effect that when by his personal law the party cannot marry in any form without a certain consent, the want of such consent will invalidate a marriage by him, notwithstanding he satisfies the lex loci actus.

I confess that these views, and I say it with all respect to the learned author, seem to me to overlook that which I have already pointed out, namely, that it is one thing for the Courts of this country to deal with matters of form when they are applying the law here to marriages effected abroad, and another thing when they are applying the English law to marriages which are effected in this country in a manner which is regarded by the Courts of a foreign country as inadequate to constitute a proper marriage ; for if in a foreign country a marriage is declared void for want of consent, which we hold a matter of form only, what difference is there, in substance, between the position in such a case and the case where the consent is more than form? The unfortunate wife is in the same position in either case, and logically there seems to be only the choice between following our own law in each case or the foreign law. I am not aware of any case in which that choice has been in favour of foreign law where an inhabitant of this country has married a foreigner in England ; nor am I able to satisfy myself that any principle which has ever met with recognition in the English Courts would justify the choice being determined in that way in such a case.

In some countries, I believe, the rules upon which jurisdiction is founded and exercised depend upon nationality rather than domicil, and in those countries the legislation purports to govern their subjects in certain respects even when in another

(1) 2 Sw. & Tr. 67.

country. For an instance of this see the provisions of the 3rd section of article I. of the French Civil Code, which ordains that the French laws relating to the condition and privileges of persons are to govern Frenchmen although residing in a foreign country. It is, perhaps, easier to understand why in such countries a personal law should be considered as following the individual wherever he may be than is the case where his position is merely regarded from the point of view of his domicil. But whether nationality or domicil be considered, why should another country in which the individual's act towards an inhabitant thereof takes place according to its laws, and has to be adjudicated upon, hold itself bound in its decision to apply the law of the country foreign to it, and to hold that the individual has carried with him a personal law of incapacity not recognized by the law where the act takes place ? So far, however, as the present case is concerned, it is not necessary for me to refer in this judgment to the whole of the cases which were very fully considered in the case of *Ogden* v. *Ogden* (1), or to the various text-writers on the Continent, in America, and in England on the subject, for the decision of Lord Hannen in *Sottomayer* v. *De Barros* (2) is to my mind decisive of the case in this Court. In his judgment in that case he followed the broad reasons given in the judgment in the case of *Simonin* v. *Mallac.* (3) He quotes very fully from that judgment and proceeds as follows: "Numerous examples may be suggested of the injustice which might be caused to our own subjects if a marriage were declared invalid, on the ground that it was forbidden by the law of the domicile of one of the parties. It is still the law in some of the United States that a marriage between a white person and a 'person of colour' is void. In some States the amount of colour which will incapacitate is undetermined; in North Carolina all are prohibited who are descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person. (4) Suppose a woman domiciled in North Carolina, with such an amount of colour in her blood as would arise from her

(1) [1908] P. 46.
(2) 5 P. D. 94, at p. 104.
(3) 2 Sw. & Tr. 67.
(4) Pearson on Marriage, s. 308.

1908

CHETTI v. CHETTI.

The President.

great grandmother being a negress, should marry in this country, should we be bound to hold that such a marriage was void? Or suppose a priest or monk domiciled in a country where the marriage of such a person is prohibited were to come to this country and marry an English woman, could the Court be called on at the instance of the husband to declare that the marriage was null and to give a legal sanction to his repudiation of his wife? Mr. Dicey, in his excellent treatise on Domicile, p. 223, answers these questions in the negative, and places these two cases under this head:—'A marriage celebrated in England is not invalid on account of any incapacity of either of the parties, which, though enforced by the law of his or her domicile, is of a kind to which our Courts refuse recognition.' But on what principle are our Courts to refuse recognition if not on the basis of our laws? If this guide alone be not taken, it will be free to every judge to indulge his own feelings as to what prohibitions by foreign countries on the capacity to contract a marriage are reasonable. What have we to do, or, to be more accurate, what have English tribunals to do, with what may be thought in other countries on such a subject? Reasons may exist elsewhere why coloured people and whites should not intermarry, or why first cousins should not. But what distinction can we properly draw between these cases, and why are they not both to be regarded in the same light here, namely, that as they are alike permitted by our laws we cannot recognize their prohibition by the laws of other countries as a reason why we should hold that such marriages cannot be contracted here?" The marriage in that case (1) was upheld by Lord Hannen, and the petition for nullity in the suit was dismissed. The only substantial distinction which may be noticed with regard to the position in that case and the present is that in that case the husband was domiciled in England, whereas in the present case the husband is domiciled abroad.

It has been suggested by a learned writer, Mr. Foote (2), that that distinction makes a very substantial difference, but I cannot myself find in Lord Hannen's judgment that he would have

(1) 5 P. D. 94, at p. 104.

(2) Private International Jurisprudence, 2nd ed., p. 107.

come to a different conclusion if the domicil of the husband had been foreign and the domicil of the wife English; for the reasons which he gives do not depend upon any such distinction, and I think the principles which he lays down are binding upon me, and that I cannot, even if I had any different view, come to a conclusion in this case that the suggested distinction ought to produce a different result.

The case of *Ogden* v. *Ogden* (1), to which reference has been made, only dealt with the question of want of consent required by French law to a marriage in England where such consent was not required; but the reasoning in that case tends to support the view which I am taking in the present case, and to shew that a man marrying an English girl domiciled in this country does not carry with him a disability of a personal character imposed by the law of his own country which would prevent him from entering into a marriage with her in this country, the marriage being one which would be recognized by the law of England as valid between persons domiciled here.

India, for the purposes of the jurisdiction of the Courts of this country, is a foreign country, though the case being dealt with is the case of a British subject from British India marrying an English girl with due form in England and now setting up in objection to the marriage that he has a personal disqualification when in India. Ought he to be allowed to do so? Ought a foreigner domiciled abroad, who comes to this country and here marries in due form according to English law another person domiciled in England, to be allowed to assert that he carries about with him, while here, the burden of an incapacity imposed by the laws of the foreign domicil to do that which he has done voluntarily and in due form according to the laws of England, or to repudiate his marriage on the ground that he is incapable of doing what he has done, and ought our Courts to support such an assertion and repudiation, with the consequent effects on the position of the wife and legitimacy of the child? To my mind the answer should be "No." This, of course, applies with equal, if not greater, force to a British subject domiciled abroad.

If then the marriage be valid in this country, the question

(1) [1908] P. 46.

1908

CHETTI v. CHETTI.

The President.

arises whether the petitioner can sue for judicial separation and the benefits which she might derive from a decree to that effect. Her rights in this respect do not depend upon any question of domicil. This has been decided in the case of *Armytage* v. *Armytage*. (1) Both parties to the present suit were within the jurisdiction at the time of its commencement, and in my opinion the petitioner is entitled to a decree of judicial separation, and I pronounce a decree accordingly, with costs and the custody of the child.

Solicitors for petitioner: *Fisher & Stevens.*
Solicitors for respondent: *T. L. Wilson & Co.*

H. D. G.

1908
Dec. 21.

IN THE ESTATE OF ALEXANDER HARPER.

Practice — Administration with Will annexed — Advertisements for Claims against Estate—Administrators' Undertaking to retain a certain Portion of Estate to meet possible Debts—Sureties dispensed with—Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 81—*Order.*

The sole executrix and universal legatee and devisee of the deceased died without having obtained probate of his will.

Advertisements having been inserted for any creditors of his estate, and no answers having been received thereto, the executors of the executrix, on applying for a grant of administration with the will of the testator annexed, were excused from finding sureties, and their personal bond alone was accepted, upon their undertaking to retain, for the space of one year, assets of the testator equivalent to about four times the amount of his known debts (including his funeral expenses), in order to meet any possible claims against his estate.

ALEXANDER HARPER, who died on November 18, 1908, left a will by which he appointed his wife, Harriet Harper, his sole executrix and universal legatee and devisee.

Harriet Harper died on November 20, 1908, before she could prove his will; and she left a will by which she appointed the present applicants her executors.

They inserted advertisements for any claimants against

(1) [1898] P. 178.

1908

HARPER, IN THE ESTATE OF.

Alexander Harper's estate, which was valued at about 16,000*l.*, his known debts (including his funeral expenses) amounting to 76*l.* 6*s.* 4*d.* only. These were stated to have been paid.

No answer to the advertisements had been received.

Bayford, for the applicants, in moving for a grant of administration with the will of Alexander Harper annexed, asked that sureties to the administration bond might be dispensed with. He referred to *In the Goods of Paton.* (1)

BARGRAVE DEANE J. granted the application and accepted the personal bond of the applicants, without sureties, upon the undertaking of the applicants to retain, for the space of one year, out of the assets of Alexander Harper, deceased, a sum equivalent to about four times the amount of the ascertained debts, so as to meet any possible claims which might be made against his estate in the meantime.

Solicitor for applicants: *J. Tharp Plowman.*

(1) [1901] P. 188.

H. D. G.

1909
Jan. 18.

DUNBAR (OTHERWISE WHITE) *v.* DUNBAR.

Nullity of Marriage—Decree—Petition for an Allowance—Registrar's Report—Motion thereon—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12)—"*Conduct of the Parties*"—*Discretion of the Court—Petition dismissed with Costs.*

After a decree of nullity, as well as after a decree of dissolution of marriage, the "conduct of the parties" is one of the material matters to be taken into consideration in dealing with any application for an allowance; and the discretion of the Court, in ordering or refusing an allowance, must be exercised according to the circumstances of each particular case.

THIS was a motion arising out of the registrar's report upon an application by the petitioner for an allowance after a decree of nullity obtained by her in a suit by reason of the non-consummation of the marriage. The ceremony of marriage took place on January 1, 1896, and the parties had lived apart since 1898. The petition for nullity was dated June 21, 1907.

From the report of the registrar it appeared that the decree nisi, pronounced on April 8, 1908, was made absolute on October 19, 1908; that the petition now before the Court was filed on October 23, 1908, and (after the usual pleadings) the registrar now found that the respondent's income averaged 380*l.* a year from his business, in addition to which he had money invested to the amount of 500*l.*, of which 120*l.* was represented by the surrender value of a policy of life insurance; that prior to the proceedings the petitioner lived with a man in South Africa as his wife; and that in consequence of the decree absolute the petitioner had become entitled to a pension of 100*l.* a year from the India Office until she should marry, and if she should marry she would be entitled to a capital sum of 1000*l.* from the same source.

The report concluded as follows: "It is submitted that, having regard to all the circumstances, this is not a case in which the Court will exercise its discretion in favour of the petitioner; the petition should, therefore, be dismissed with costs."

1909

DUNBAR v. DUNBAR

Whately, for the petitioner, moved to set aside or vary the registrar's report. One of the points appears to be whether the fact of the petitioner having cohabited with another man after the ceremony of marriage with the respondent makes any difference to her right to claim an allowance from him under the Matrimonial Causes Act, 1907. (1)

[SIR GORELL BARNES, PRESIDENT. What, prima facie, are her rights? The object of that Act, so far as nullity suits are concerned, was to remedy a defect that previously existed. In some cases of nullity, for instance, a husband or wife of one of the parties turned up after a number of years, and there was no power, in the absence of a settlement, to do anything for the woman who had believed herself a wife, and perhaps had children, and who might be left destitute. There may, however, be a great distinction between one case and another. A woman, moreover, ought to take proceedings within a reasonable time and not go and live with some one else. If she takes this line she cannot complain. Why did not she bring her suit years before? The respondent was in this country, and he was contributing to her support during a considerable portion of the time they were apart. The Court is bound to have "regard to the conduct of the parties" in considering applications for an allowance, whether the suit be for nullity or for divorce.]

W. O. Willis, for the respondent, opposed the petitioner's motion and asked that the report of the registrar should be

(1) 7 Edw. 7, c. 12, s. 1, is as follows:—

"(1.) The Court may, if it thinks fit, on any decree for dissolution or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable, and for that purpose may refer the matter to any one of the conveyancing counsel of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties, and the Court may, if it thinks fit, suspend the pronouncing of its decree until such deed shall have been duly executed.

"(2.) In any such case the Court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the Court may think reasonable, and any such order may be made either in addition to or instead of an order under the last preceding sub-section."

1909

DUNBAR v. DUNBAR.

confirmed. The petitioner was living in concubinage after she had instituted her suit for nullity. Her conduct disentitles her to any allowance from the respondent. Moreover, she has lost nothing, her claim to a pension and to arrears having been recognized by the India Office.

[He was stopped by the Court.]

SIR GORELL BARNES, PRESIDENT. There is no difficulty in deciding this case. It arises under s. 1 of the Matrimonial Causes Act, 1907, and the application is to compel the respondent to provide further maintenance for the petitioner.

These cases are entirely a matter of discretion. The words of the section are very wide and distinctly shew that to be so; and the discretion must be exercised on the particular circumstances of each case.

I do not think it necessary to go into the details of this case, which have been very fully discussed. The registrar has reported that, "having regard to all the circumstances, this is not a case in which the Court will exercise its discretion in favour of the petitioner," and I am of the same opinion.

Taking all the facts into consideration, and having regard to the conduct of the parties, it would not be reasonable, as the petitioner is in fact provided for, to make any order against the respondent.

This lady, if she had chosen, could have brought her suit years before. In that case she would have been in a worse position, as the Act of 1907 had not been passed, and she could have got no allowance from her husband. Suits for nullity ought to be brought, and dealt with, with reasonable promptitude. Each case must depend on its own merits, and the Court must be guided by the facts of the particular case before it.

In my view the registrar was right. I think that the petitioner in this case should have left matters as they were and not have presented this petition.

As she has chosen to present the petition and has failed, her petition must be dismissed with costs.

Solicitor for petitioner: *Wilfrid Powell.*

Solicitors for respondent: *Tilleards.*

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.
1908
Dec. 15, 16.
1909
Jan. 18.

THE SCHWAN.

Admiralty—Ship—Bill of Lading—Exceptions and Conditions—Damage to Cargo—Seaworthiness—Negligence of Shipowners' Servants.

A cargo of sugar was shipped at Bremen on board the defendants' steamship for conveyance to London under a bill of lading containing (inter alia) the following exceptions and conditions:—(1.) "all accidents loss and damage whatsoever from defects in hull tackle apparatus machinery boilers steam and steam navigation or from perils of the seas . . . . or from any act neglect or default whatsoever of the pilot master officers engineers crew stevedores servants or agents of the owners in the management loading stowing discharging or navigation of the ship or . . . . otherwise and the owners being in no way liable for any consequences of the causes before mentioned." (2.) "It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship her tackle machinery and appurtenances shall be considered a fulfilment of every duty warranty or obligation and whether before or after the commencement of the said voyage."

On the voyage the sugar was damaged by the inflow of sea water into the hold owing to the plug of a "three-way cock," fitted on the main bilge pipe, not having been properly adjusted by the engineer so as only to be open at one time in two directions, and to the failure of a non-return valve to act in consequence of a piece of spun yarn preventing its closing:—

Held by the Court of Appeal (reversing the decision in the Court below, [1908] P. 356), that the defendant shipowners were not liable, for there was not sufficient evidence to shew that the vessel was unseaworthy when she left Bremen, and, in so far as the damage to the plaintiffs' cargo was occasioned by either or both of the two causes—namely, the three-way cock not being properly adjusted, and the non-return valve not being properly closed—these were either defects in machinery, or defects caused by the neglect of the engineer, against which the defendant shipowners were equally protected by the terms of the bill of lading.

Appeal by defendants, the Argo Steamship Company of Bremen, owners of the steamship *Schwan*, in an action for damage to cargo, against a decision of Bargrave Deane J. holding them liable for sea-water damage to a cargo of sugar belonging to the plaintiffs, Abram Lyle & Sons, Limited. (1)

(1) Reported in the Court below, [1908] P. 356.

C. A. 1908

THE SCHWAN.

Under bills of lading, duly indorsed to the respondents (plaintiffs), dated November 26, 1907, and signed by the agent of the appellants (defendants) on their behalf, 5500 bags of sugar were shipped by J. H. Bachmann, in good order and condition, on board the *Schwan*, at the port of Bremen, to be delivered in the like good order and condition unto order account Lyle at London.

The appellants (defendants) failed to deliver some of the bags of sugar at all and delivered others in a greatly deteriorated and damaged condition, and the respondents (plaintiffs) by their statement of claim alleged, inter alia, that they had "suffered damage by the breach of a contract between the plaintiffs and the defendants to carry the plaintiffs' goods in the *Schwan* from Bremen to London for reward to the defendants in that behalf, and on the terms, amongst others, that the said vessel should be seaworthy and reasonably fit to carry the said goods on the said voyage, yet the said vessel was not at the time when she sailed on the said voyage seaworthy for the same and reasonably fit for the purpose aforesaid, whereby the said goods, or some part of them, were lost and damaged and deteriorated as aforesaid."

The "particulars of unseaworthiness" were that "the main hold bilge suctions and the connections and valves thereof or some of them were obstructed or were otherwise in a defective imperfect or inefficient condition and of defective design whereby water was enabled to reach the said goods lying in the said hold."

The defence, so far as material, was that the appellants (defendants) were not liable, as the damage was caused by one or some of the matters in clause 1 of the bill of lading, and that they, the appellants (defendants), exercised all reasonable care and diligence as provided by clause 10.

The following were the exceptions and conditions in the bill of lading relied on :—

"1. The act of God . . . . and all accidents loss and damage whatsoever from defects in hull tackle apparatus machinery boilers steam and steam navigation or from perils of the seas ports harbours canals and rivers or from any act neglect or default whatsoever of the pilot master officers engineers crew

stevedores servants or agents of the owners in the management loading stowing discharging or navigation of the ship or other craft or otherwise and the owners being in no way liable for any consequences of the causes before mentioned."

"10. It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship her tackle machinery and appurtenances shall be considered a fulfilment of every duty warranty or obligation and whether before or after the commencement of the said voyage."

At the trial in the Court below the learned judge (who was assisted by two of the Elder Brethren of the Trinity House) found that the damage to the cargo of sugar was caused by the admission of water into the hold through a "three-way cock" the plug of which had not been properly adjusted by the chief engineer of the vessel, and in the course of his judgment said: "The *Schwan* was a new ship. She had been quite recently built at the Rostock yard, in Germany, and passed by the German Lloyd and by the Board of Trade. I think she is a passenger ship of the first class. The bills of lading shew that 5500 bags of sugar were shipped, and when the vessel arrived in the Thames it was discovered that a large quantity of water had got into the afterhold, with the result that the cargo there was practically all spoilt; and the question is whether under the bills of lading the owners of the ship are responsible for the damage to the sugar. On the one side it is said by the shipowners that the conditions and exceptions in the bills of lading are such that they are not responsible. On the other side it is said that the cause of this injury was a defect in the machinery, which would have been palpable to any one who had taken the trouble to find it out, and that the responsibility rests with the shipowners." After reading clauses 1 and 10 of the bill of lading, already set out, the learned judge continued: "It seems to me that the whole of this case depends upon clause 10. Did the shipowners or their agents exercise reasonable care and diligence in connection with the ship, her tackle, machinery, &c.? Now the trial has been of a rather technical character. We have had to go with some detail into the condition of the machinery of the ship connected with her pumping apparatus, and it appeared that she had as

C. A. 1908

THE SCHWAN.

part of her machinery what is called a three-way cock. It was a pipe with a three-way junction, one open to the sea to let in the water, one open to the bilge, and one open to the pump. This three-way cock was worked with what was technically called a plug, and that had two openings in it, with the result that when you turned the plug it was supposed to open to two of the ways only, and not into three. . . . . As it turned out, this particular plug with two openings was so constructed that if the plug was not very carefully turned it might possibly be partly open to all three of the ways instead of only two. In this particular case it was partly open to all three, with the result that the water passed through into the pipe which led into the hold. There was towards the end of the main pipe a non-return valve, which should have kept any water which got into the pipe from passing into the hold, but, unfortunately, into the valve there had got a piece of spun yarn, which prevented that valve from being screwed down. Those two matters were the cause of the injury to the cargo, because water passed by the three-way cock down the pipe towards the hold, and by reason of the valve being blocked it passed through into the hold. That is the cause of the damage. How comes it that that happened? . . . . This ship was built in the Rostock yard. The owners employed the chief engineer to be at the yard and superintend from the beginning the putting together of the machinery, to pass it, and get thoroughly acquainted with it—a most proper precaution. He knew about this three-way cock being put into the ship, and he ought to have discovered at the time that the plug of this three-way cock was not to be depended upon so as to be safe. He ought to have known that unless it was very carefully manipulated there was a possibility of its being partly open in all three ways at once. He says he knew it. I am sorry to say that I do not believe him . . . . my belief is that the chief engineer neglected to test it (the three-way cock) at the time when he was placed by the owners in charge of the building of the ship and the arrangement of her machinery in the Rostock yard. That being so, I am of opinion that this comes within clause 10 of the bill of lading, and that the shipowners, through their agent, the chief engineer, did not exercise reasonable

care and diligence in connection with 'the ship, her tackle, machinery,' &c., and that the whole of this accident is due to that fact . . . . Therefore my judgment is for the plaintiffs, on the ground that the defendants have not established due care, through their agent, in the arrangement of the machinery of the ship."

The appeal was heard on December 15 and 16, 1908, when the Court, consisting of Lord Alverstone C.J., Vaughan Williams and Buckley L.JJ., was assisted by two nautical assessors. In the course of the judgment of the Court the following evidence, given in the Court below, as to the working of the "three-way" cock, and the "non-return" valve, was referred to by the Lord Chief Justice.

Cross-examination of a consulting engineer, called by the plaintiffs:—

Q. Your objection to it (the three-way cock) is that it will leave three ways open at the same time?—A. That is so.

Q. In a certain position?—A. In a certain position.

Q. And you, having looked at it, can so manage it that it would never open in that way?—A. Yes.

Q. It is a matter, therefore, of the skill of the man who works it?—A. Provided that he knew that it was so.

Q. And, in a number of positions, he would not have the three ways open?—A. Yes, there is a fairly good range; he would only have the two open.

Q. And, with the three valves open, nothing would happen unless the non-return valve was wrong?—A. No.

Q. Therefore, you have got to have two things happen: that the engineer has put this (the plug) so that there are three ways open, and, in addition, that something quite separate, namely, the non-return valve, is not working?—A. Yes.

Examination (through an interpreter) of the chief engineer of the vessel, called by the defendants:—

Q. Are you well acquainted with the way this (three-way) cock works?—A. Yes.

Q. Is it a fact that in certain positions, a few positions, all three ways are open?—A. Yes.

Q. Did you know that when it was fitted?—A. Yes, I did.

C. A. 1908

THE SCHWAN.

Q. I have got it open now three ways. [Describing.] It is quite easy to turn it so that all three ways are open?—A. If it stands in the right position the water cannot enter.

Q. And can he put it in the right position?—A. Yes.

Examination of the superintendent engineer, called on behalf of the defendants:—

Q. Have you ever had any trouble with this three-way cock before?—A. No, I have not.

Q. Or since—either before or since?—A. No.

Q. And has the *Schwan* been trading, ever since she came out, with this cock?—A. With exactly the same cock.

Examination of a consulting engineer, called on behalf of the defendants:—

Q. It is a very simple matter to examine the (non-return) valve to see whether it is all right?—A. I had the four of them opened out this morning in less than five minutes.

Q. Now, with regard to this three-way cock, is it fitted flush with the plate?—A. The upper part of the plug on which the grooves are is just flush with the engine-room flooring.

Q. Is it possible to tell quite easily what position it is in?—A. It is right before you; oh, yes.

Q. That is to say, to tell the position which the cock is in?—A. In which the grooves are.

Q. And if anybody wanted to prevent water getting through the bilge pipe, is it a perfectly simple matter to do so?—A. It is a perfectly simple matter.

Cross-examination of the same witness:—

Q. Even if there are only two (positions in which the cock would be improperly adjusted), a man who was not aware that there was a cock so complicated would never know or suspect for a moment that this water was running down in the hold?—A. Oh, I think he would, for the reason that the grooves are on the head of the plug for the purpose of letting the engineer know it is at right angles; it is a right-angled plug.

Scrutton, K.C., and *A. D. Bateson*, for the appellants (defendants), the owners of the *Schwan*.

J. A. Hamilton, K.C., *Laing, K.C.*, and *R. H. Balloch*, for the

respondents (plaintiffs), owners of the damaged sugar. The arguments of counsel sufficiently appear from the judgment. In addition to the case therein mentioned, counsel for the appellants (defendants) referred to *Hedley* v. *Pinkney & Sons Steamship Co.* (1)

Cur. adv. vult.

1909. Jan. 16. The judgment of the COURT was delivered by

LORD ALVERSTONE C.J. This was an appeal in an action for damage to cargo brought in the Admiralty Division by the owners of a consignment of sugar which had been carried upon the defendants' steamer *Schwan*, from Bremen to London, and arrived damaged from sea water.

The sea water had penetrated into the hold or compartment in which the sugar was being carried, through a certain sea-cock—referred to in the evidence as a "three-way cock"—and through certain piping in which there was a non-return valve to prevent the inflow of sea water, which might pass through the sea-cock into the pipe leading to the bilges, getting into the ship. The sea-cock in question was a cock having three pipes to it, one leading to the sea, another leading to the pump, and the third leading to the bilges in which the non-return valve was placed. The cock was so constructed that if left in a certain position, as illustrated in diagram A on the plan produced before us, the passage way to the sea, and to the pipe to the bilges, might both be partly open, as well as the pipe to the pumps, so that sea water, flowing in through the pipe from the sea, or drawn through by the pumps, might pass, if not stopped by the non-return valve, into the bilges and so into the hold.

On examining the vessel after her arrival in London, it was found that a piece of tow, or spun yarn, had got into the seat of the return valve, so that the valve could not be screwed home, and in consequence a passage was left to the bilge pipe, notwithstanding that the valve was screwed down hard.

The cargo was carried under a bill of lading which contained the following clauses: [The learned judge read clauses 1 and 10 already set out, and continued:—]

(1) [1894] A. C. 222.

C. A. 1909

THE SCHWAN.

Having regard to the above conditions, in order to recover in the action, the plaintiffs must prove that the damage was occasioned by the unseaworthiness of the *Schwan;* and that the agent of the shipowners had not exercised "reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances." It is difficult from the judgment of Bargrave Deane J. to ascertain whether he found as a fact that the vessel was unseaworthy. He finds (1) that the two matters which caused the damage were, first, the construction of the three-way cock, which allowed water to pass from the sea into the bilges; and, secondly, that the non-return valve could not be properly seated in consequence of the presence of the spun yarn on the seat. He then proceeds to consider whether the peculiar construction of the sea-cock to which I have referred was known to the defendants' engineer, and came to the conclusion that he had not discovered it until the idea that water might have passed through the three-way cock occurred to his mind on the voyage from London back to Bremen, after the sugar had been unloaded. He held that, inasmuch as the chief engineer, who was in charge of the arrangements of the machinery when the ship was being built in Rostock yard, had neglected to test the three-way cock, and had not discovered that its construction permitted the water to pass from the sea to the pipe and the bilges, the defendants were not protected by clause 10 of the bill of lading, but were liable for damage caused by the condition of the ship as above described.

In order to support the judgment it must be assumed that the learned judge thought that the vessel was unseaworthy; but he nowhere says so, and it is unfortunate that he did not deal in any way with the other part of the case, namely, that the water could not have got to the sugar unless it got past the non-return valve, which valve under ordinary circumstances would have prevented the inflow of water but for the fact that it could not be closed for the reason above stated.

Clause 1 of the bill of lading protects the shipowner against all damage from defects in the hull, apparatus, and machinery, or from any neglect or default whatsoever of the engineers,

(1) [1908] P. 356, at p. 360.

crew, or agents of the owners, in the management, loading, stowing, or navigation of the ship. If, therefore, the passage of the water through the sea-cock to the pipe to the bilges, or the failure of the non-return valve to act, in consequence of the piece of spun yarn under its seat, was due to a defect in the machinery not amounting to unseaworthiness, or to the neglect of the engineer, the defendants would be protected and this action fails.

It was, we think, established that the sea-cock was of unusual construction, in that the port of the cock leading to the pipe to the bilges might be partly opened, while the port leading from the sea was also partly open, and there is no doubt that, in ordinary cases, the ports in the plug are so arranged that the entrance to the bilge pipe would not be opened at all until the pipe from the sea was closed. The object of the three-way cock was to allow water to be pumped out of the bilges when necessary, at which time the pipe to the sea should be closed, and to allow water to be pumped from the sea, for circulation and sanitary purposes, during which pumping the pipe to the bilges should be closed. We were advised by our assessors that a sea-cock so constructed is a dangerous cock, and the experience of cases in the courts has shewn, on not a few occasions, the danger of sea-cocks which are arranged so as to let water into the bilges or holds of the vessel. But we were further advised that a careful engineer could have adjusted the plug so that the pipe to the bilges would be closed when the pipe communicating with the sea was open; and that the non-return valve, if in working order, would be a sufficient protection against the entrance of any water which might get into the pipe to the bilges in consequence of the construction of this particular valve.

It was in evidence that a man, if he understood the construction of the sea-cock, would have no difficulty in so turning the plug that the pipe to the bilges would be closed whenever the sea-cock was open. This was the vessel's second voyage with the same engineer, and we come to the conclusion, having regard to the advice given to us, that the vessel was not unseaworthy, and that, so far as the sea-cock was concerned, the case falls within the principle of *Steel* v. *State Line Steamship Co.* (1)

(1) (1877) 3 App. Cas. 72.

C. A. 1909

THE SCHWAN.

In our opinion the three-way cock allowing water to pass so as to damage the cargo was due to the neglect or want of care of the engineer in not seeing that the plug of the cock was in its proper position. [The learned judge referred to the evidence as to the three-way cock and the non-return valve, already set out, and continued :—] Against this neglect the shipowners are protected by the terms of the bill of lading. We are further of opinion that the defendants are protected against the consequences of the second of the two causes which led to the damage, namely, the fact that the non-return valve could not be closed by reason of the presence of the spun yarn underneath the seat, on the ground that this was either a peril of the sea, or a defect in the apparatus and machinery, or a defect arising from the neglect or default of the engineer. So far as clause 10 applies, upon the evidence there was nothing to shew that there had been any want of reasonable care and diligence in connection with this valve while the vessel was being built or afterwards, unless it was due to want of supervision by the engineer on the voyage ; so that in so far as it caused, or contributed to, the damage, the defendants would in either event be protected under clauses 1 and 10. It was said that pieces of spun yarn, or chips of wood, may get through the screens and baffle plates, designed to stop them, and so reach the valve, and that this occurrence was not uncommon even during the voyage, and the instructions to surveyors, referred to in the evidence, direct that such an appliance shall be employed in order to prevent the risk of water getting into the holds.

In our opinion there was not sufficient evidence to shew that the vessel was unseaworthy when she left Bremen, and that in so far as either one or both of the two causes occasioned the damage, they are either defects in machinery or defects caused by the neglect of the engineer, against which the defendants are protected by the terms of the bill of lading. For these reasons we are of opinion that the appeal must be allowed with costs and judgment entered for the defendants in the action with costs.

Solicitors for appellants (defendants) : *Thomas Cooper & Co.*

Solicitors for respondents (plaintiffs) : *Cattarns & Co.*

T. L. M.

THE PRINCE LEOPOLD DE BELGIQUE.

1909
Dec. 12, 14, 15.

Admiralty—Collision—Swansea Entrance Channel—Application of art. 25 *of the Regulations for Preventing Collisions at Sea,* 1897—*Good Seamanship.*

Article 25 of the regulations for preventing collisions at sea applies to the entrance channel formed by the east and west pier at Swansea, so that it is incumbent on a steam vessel in that narrow channel to keep to that side of mid-channel which lies on her starboard hand, but circumstances may prevent the rule operating to its full extent throughout the channel, for when a vessel is coming away from the tidal basin of the Prince of Wales Dock on the east side, and is proceeding down the channel, she will, in order to get on her proper west side, have to cross the channel leading up to the Ocean Dry Dock, or other dock in the west channel, towards which another vessel, coming in, may be making. In such a case good seamanship dictates that the vessel which will reach the point of intersection of the channels reasonably in advance of the other should keep on, and that the other should wait, though, if both are approaching the point at about the same time, it will be reasonable for the vessel which has the tide against her to wait until the other has passed.

Action of Damage by Collision.

The plaintiffs were the owners of the steel screw steamship *Burton*, of 649 tons gross register, from Duclair to the Prince of Wales Dock, Swansea, in ballast, manned by a crew of twelve hands. The defendants were the owners of the steel screw steamship *Prince Leopold de Belgique*, of Antwerp, of 1218 tons gross register, from Bristol to the Ocean Dry Dock, Swansea, in ballast, manned by a crew of twenty hands, and in charge of a duly-licensed Swansea pilot. The weather at the material time, 7.30 p.m. on October 2, 1908, was fine and clear, the wind south-easterly light, and the tide half flood of the force of one to two knots. According to the finding of the Court, the collision took place, nearly end on, in about mid-channel some three hundred feet below the Tongue buoy in Swansea entrance channel, when the *Burton*, having found the dock entrance obstructed, had turned round in order to proceed down the entrance channel to wait her turn outside, whilst the *Prince Leopold de Belgique* was proceeding up the entrance channel, sounding three long

1909

THE PRINCE LEOPOLD DE BELGIQUE.

blasts on her whistle to indicate that she was bound to the Ocean Dry Dock. The plaintiffs' vessel was proceeding at a speed of about two knots over the ground, the defendants' vessel at about three knots through the water.

The case is reported on the question of the relative duties, from the point of view of good seamanship, of two steamships in the positions indicated above, and whose courses would cross at the point of intersection of the channels leading to the two docks, whilst having due regard to the starboard hand rule of the Regulations for Preventing Collisions at Sea, 1897. (1)

1908. Dec. 12, 14. *Laing, K.C.*, and *Adair Roche*, for the plaintiffs, owners of the *Burton*.

Aspinall, K.C., and *Dawson Miller*, for the defendants, owners of the *Prince Leopold de Belgique*.

The facts of the case and the arguments of counsel fully appear from the judgment.

Dec. 15. SIR GORELL BARNES, PRESIDENT. The collision in this case took place on October 2 last, at about half-past 7 in the evening. The *Burton* was proceeding down the cut or entrance channel of Swansea, and the *Prince Leopold de Belgique* was coming in, and they met in collision nearly end on, at a very slight angle, and the damage was done which the surveyors have spoken to and which is indicated on the photographs. The question is by whose fault it was that this collision took place.

The plaintiffs' case, stated very shortly, is that their vessel had come in on the flood tide and was going into the Prince of Wales Dock, but there was a crowd of shipping or some other cause which operated to prevent her being docked, and, therefore, she found it necessary to turn round in the narrow channel that leads up from the Tongue buoy, and was proceeding out again when she met with the difficulties in which she found herself. Her witnesses say that having turned round they came past the Tongue buoy and saw the red light of the *Prince*

(1) Art. 25: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

1909

THE PRINCE LEOPOLD DE BELGIQUE.

The President.

Leopold de Belgique coming up the channel; that they proceeded down, keeping well over towards the west pier; and that the *Prince Leopold de Belgique* afterwards starboarded, came across the channel and into them, and the collision happened.

The defendants' case is that they were coming in, in the ordinary way, sounding three long blasts to indicate that their vessel was going up to the Ocean Dry Dock, and that they had seen the *Burton* lying more or less athwart the channel leading up to the Prince of Wales Dock and shewing her green light down channel; that afterwards the *Burton* came down, having rounded, and that, as they were about to enter into that part of the river which leads up to the Ocean Dry Dock, the *Burton*, which had previously been shewing her green light, suddenly blew a short blast and opened her red light; and that then, although the engines were reversed, and although they had previously given two short blasts to warn the *Burton*, that vessel came on and struck them, the vessels meeting in the way I have described. So that the plaintiffs' case is that they were going down allright, and had got practically past the part of the channel which leads up to the Ocean Dry Dock, and that the other vessel starboarded into them; and the defendants' case is that they had got nearly into the position in which they enter the channel leading up to the Ocean Dry Dock, when the other vessel, which was till then shewing her green light, came across them, trying to cross the channel.

Now the place where this collision happened undoubtedly is a dangerous place, because, if the chart is looked at, it will be seen that a vessel coming away from the tidal basin of the Prince of Wales Dock must cross the channel which leads up to the Ocean Dry Dock, and on the other hand a vessel coming in and going up to the Ocean Dry Dock must cross the channel which leads up to the tidal basin of the Prince of Wales Dock. Vessels must cross each other, and however much the starboard hand rule applies, there are circumstances here which prevent it operating to the full extent. In the ordinary course of navigation each vessel must get across the course of the other at some time. There is no rule, I understand, which applies to this particular point, and, having discussed

1909

THE PRINCE LEOPOLD DE BELGIQUE.

The President.

the matter with the Elder Brethren, it appears to me that vessels must deal with each other on the footing of good seamanship, of course complying, as far as possible, with the necessity of keeping on their starboard hand of the channel. It results from that, that if one vessel comes to the point of intersection reasonably in advance of the other she must keep on, and the other must wait till she has passed. If both approach the spot at about the same time, then they must act reasonably, and it would be very reasonable that the one which has the tide against her should wait while the other passed. Apart from those general considerations, which must apply to a case like this, the difficulty of deciding the case must depend upon the exact facts which one finds. Now the plaintiffs' vessel had been in the difficulties which I have mentioned up this channel to the Prince of Wales Dock, and the first matter to consider is what course would the plaintiffs naturally follow in order to get out of those difficulties? Well, having regard to the extremely narrow channel in which they were, they would have to back and fill and turn round very slowly, and finally get straight down, and certainly, in getting straight down, come close past the Tongue buoy, and then shape across so as to get gradually over towards the west pier and pass close to it. The defendants, if they followed the proper course, would keep on the starboard side of the lower part of the entrance, and, if doing what they say they ought to do, would be blowing three long blasts to shew that they were going to the Ocean Dry Dock. Then, at some point between the fixed white light and the Tongue buoy, they would have to incline over under slight starboard helm, so as to enable them to bring the Tongue buoy on the starboard hand; and that is, roughly speaking, what the two vessels would have to do.

The first question which has to be determined, and which helps very much to solve the case, is whereabouts did the collision take place? The plaintiffs say, and they called two independent witnesses who supported their view, that it took place opposite the end of the east pier, or nearly so. The defendants on the other hand say, and they called one independent witness, the master of the tug which was in the channel

1909

THE PRINCE LEOPOLD DE BELGIQUE.

The President.

leading up to the tidal basin, that it took place further up, some 250 or 300 feet from the Tongue buoy. The plaintiffs said it took place close to the west pier, some fifty or sixty feet from it; and the defendants said it took place in mid-channel. By mid-channel is meant there the middle of the channel between the east and west pier, before the channel forks and goes on the one side up the river Tawe and on the other side up to the tidal basin. There is a great conflict as to the place of the collision, and the materiality of it is that, if the plaintiffs' version be correct, they had crossed the passage up the river Tawe and the defendants' vessel came wrongfully across the channel into them; if the defendants' view be correct, then the plaintiffs' vessel had not yet crossed the channel which leads up the river Tawe, but was in a position to allow the defendants' vessel to enter that channel. My own view is that in that conflict there is a material fact which assists the determination, more or less, of the question which is the probable story, and that is the angle at which this collision took place. A drawing has been put in, and there are the photographs, which shew the cut which was made in the starboard bow of the *Prince Leopold de Belgique* and the damage to the bows of the *Burton*, and what is there seen very nearly fits what I have heard in the evidence about the blow being pretty nearly end on. I think that solves this case pretty largely in favour of the defendants. If the story told by the plaintiffs be correct, it is a story, in substance, that they were coming down with their red light open to those on the *Prince Leopold de Belgique*, and that vessel's red light was open to them; that the collision happened within fifty or sixty feet of the west pier; and that the *Prince Leopold de Belgique* came across so as to cause this collision. I do not think it is possible to make this collision happen at such an angle as that indicated if this story told by the plaintiffs is true. On the other hand, if the collision took place higher up river and nearly in mid-river, there is not the slightest difficulty, because in the natural course, if the plaintiffs' vessel had got fairly straightened down to come down that channel from the tidal basin, and the *Prince Leopold de Belgique* had, as she might naturally have, a slight angle across from the east pier, so as to leave the Tongue

1909

THE PRINCE LEOPOLD DE BELGIQUE.

The President.

buoy on her starboard hand, the angle at which these vessels would find themselves in collision would be pretty nearly that which this damage indicates. So my view is that the collision, on the inference from the facts, took place where the defendants say, and I must say, having seen their witnesses, I think they gave their evidence extremely well, and have led me to take the view that the collision happened where they say it did.

That being so, there is not much more to say about the case, because it seems to me that what I have said carries with it a general view in favour of the defendants. There are one or two points which assist that view, and they are these. In the first place, it is clear that those on the plaintiffs' vessel were in difficulties, and so I do not think they took adequate notice of what was going on below. The tug and tow which have been mentioned in the case were not seen until quite close to. Secondly, the defendants' vessel in coming in would undoubtedly, wherever you put this collision, have the green light of the plaintiffs' vessel almost ahead of her until the *Burton* had succeeded in rounding from the position of difficulty in which she found herself, and that is in substance what the defendants say. Thirdly, the plaintiffs' case is that the red light of the defendant vessel was seen all the way along until the very last, and it seems to me almost incredible, if that were so, that the defendants should try to cross the channel and come into collision with a vessel close over against the west wall. It seems so unreasonable, because if she had not hit the vessel she would have hit the wall or been in difficulty with it. This collision seems to me to have occurred through the plaintiffs not adequately appreciating what was happening down below them and not waiting for the other vessel to pass. I do not think there is anything to be said against the defendants for not acting sooner with their engines than they did, and in my opinion the plaintiffs' vessel must be held alone to blame.

Solicitors for plaintiffs, the owners of the *Burton : Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for defendants, the owners of the *Prince Leopold de Belgique : Downing, Handcock, Middleton & Lewis.*

T. L. M.

THE SEYMOLICUS.

1909
Jan. 26, 27.

Admiralty—Collision—Lerwick Harbour—Narrow Channel—Regulations for Preventing Collisions at Sea, 1897, *art.* 25.

The harbour of Lerwick, in the Shetland Islands, is not, except so far as its northern and southern entrances may be so regarded, a narrow channel within the meaning of art. 25 of the regulations for preventing collisions at sea.

Action of Damage by Collision.

The plaintiffs were Richard Irvin & Sons, Limited, owners of the *Lottie*. The defendants were the owners of the *Seymolicus*.

The case involved the question whether the narrow channel rule applies to the waterway, between the mainland of the Shetlands and Bressay Island, which forms the harbour of Lerwick, as each side, inter alia, charged the other with an infringement of art. 25 of the regulations for preventing collisions at sea, by neglecting to keep to that side of the fairway which lay on their starboard side. (1)

On July 6, 1906, about 11 A.M., the *Lottie*—a steam drifter of North Shields, of sixty tons gross register, with engines of twenty horse power nominal, and manned by a crew of ten hands—was proceeding down Lerwick Harbour from the northern entrance, in the course of a voyage from the North Sea fishing grounds to the fish market at Lerwick with a cargo of about nine crans of fish. The weather was fine and clear, the wind about S.E. light, and the tide about high water slack. The *Lottie* was on a course of about S.b.W. magnetic, and was approaching the south buoy marking the shoal called Loofie Baa, when those in charge observed—some 300 to 400 yards distant, off North Ness, bearing about a point on the starboard bow, and, as they alleged, coming into sight round a steamship at anchor to the west of the buoy—the *Seymolicus*, a steam drifter of Yarmouth, of sixty-seven tons gross register, engines of twenty horse power nominal, with a crew of ten hands, and proceeding up the harbour, bound for a

(1) "Article 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

1909

THE SEYMOLICUS.

fishing station in the northern part where she was to discharge her catch. Those in charge of her alleged that when they observed the *Lottie*, distant about 300 yards, and bearing slightly on the port bow, they were working their engines at slow, and were keeping on that side of the fairway which lay on their starboard side.

According to article xii. of the preliminary act filed on behalf of the defendants, "When the *Lottie* was seen the whistle of the *Seymolicus* was sounded one short blast and she was kept as much to the eastward as was prudent having regard to the shoal on her starboard hand. When the *Lottie* was seen to be starboarding causing danger of collision the engines of the *Seymolicus* were put full speed astern and her whistle was sounded three short blasts," and according to paragraph 3 of the defence, when the *Lottie* was observed distant about 300 yards and bearing slightly on the port bow, "the whistle of the *Seymolicus* was immediately sounded one short blast"; but, according to the finding of the Court, when the vessels were, at the material time, nearly end on, so that art. 18 of the regulations for preventing collisions at sea applied, the master of the *Seymolicus* gave the starboard helm signal (two short blasts), instead of one short blast, whereupon those in charge of the *Lottie* slightly starboarded so as to pass starboard to starboard, and, on the *Seymolicus* porting, the engines of the *Lottie* were put to dead slow, then to stop, and then full speed astern; but the collision occurred, with the result that the *Lottie* was forced against the sailing smack *Choice*, and did that vessel considerable damage. In the opinion of the Court neither the plaintiffs' nor the defendants' vessel was exceeding the speed limit of four miles per hour required by the Lerwick by-laws.

1909. Jan. 26. *Laing, K.C.*, and *Hugh C. S. Dumas*, for the plaintiffs, the owners of the *Lottie*.

Aspinall, K.C., and *D. Stephens*, for the defendants, the owners of the *Seymolicus*.

Jan. 27. BARGRAVE DEANE J. This was a collision between two steam drifters in Lerwick Harbour, which is a narrow

piece of water lying between the mainland of Shetland and the island of Bressay, and, as far as I am able to judge by the evidence, not very much damage was done to either one vessel or the other; but the real difficulty seems to have been that as a result of the collision the *Lottie* collided with a sailing smack which happened to be passing her on the port side, and that smack, the *Choice*, which is not a party to the proceedings, seems to have received considerable damage.

The collision having happened as long ago as July, 1906, the parties seem to have been considering their position all that time, until at last it was determined that it was necessary to decide which vessel was responsible for the damage to the *Choice*. That, apparently, is the position to-day. I have to decide which, or whether either or both, of these drifters was to blame for the collision between them. The *Lottie* and the *Seymolicus* are two drifters of practically the same size and horse power, and the practice seems to be for these vessels, when they have got their fish, to come into Lerwick Harbour, go to the fish market and dispose of their fish so far as sale goes, and then put off to their own particular wharf to discharge the cargo at the call of the purchasers. You can enter the harbour either from the south or from the north, and undoubtedly it is in a sense, considering previous decisions, a narrow channel; but in my opinion it is not a narrow channel within the meaning of the decisions. In my opinion it is a harbour. Perhaps the entrance, one end or the other, might be considered a narrow channel, but the place where this collision happened is distinctly a harbour. Therefore I dispose first of all of the contention that this is a case in which the narrow channel rule applies.

The *Seymolicus* had arrived at Lerwick first. She had been to the fish market and had sold her fish, and then was proceeding to the north with a view to going to Donaldson's wharf, up near the northern entrance. The *Lottie* came in from the northern entrance, and, looking at the chart, it appears to be fairly wide at that part of the harbour, but on the port hand as you come down from the north there are shoals which are protected by three buoys, extending down as far as the Loofie Baa. The collision happened close to the buoy off the Loofie Baa,

1909

THE SEYMOLICUS.

Bargrave Deane J.

Now the stories told are about as contradictory as can well happen. To this extent the case is common. The collision took place at a spot about thirty or forty feet from that buoy, the stem of the *Seymolicus* striking the starboard side of the *Lottie* about six feet from her stem, and the force of the blow driving the *Lottie* over on to the *Choice*, which was sailing up on the port side of the *Lottie*. Having got to that point, everything else is in absolute contradiction, and I have to say on which side the truth lies. On the one side I have had evidence from the *Lottie*, the evidence of two witnesses from another drifter, called the *Holly*, and the evidence of a man who was engineer on board the *Seymolicus* at the time, and has since left her and is now serving in another vessel. Then on behalf of the *Seymolicus* I have had the master, the mate, and the fireman.

The case put forward by the *Lottie* is one which agrees throughout, and the story is this: that as she was approaching this buoy she saw the *Seymolicus* coming up, and the vessels would have passed port to port but for hearing a two-blast signal from the *Seymolicus*, which induced the master of the *Lottie* to starboard his helm; that having starboarded his helm, following upon that two-blast signal, the master of the *Lottie* suddenly discovered that the *Seymolicus*, when pretty close to, had ported, and the collision happened—they were too close to avoid it. Now that story all depends upon two points. First, did the *Seymolicus* give a two-blast signal, and, secondly, what was the distance these two vessels were apart when the *Seymolicus* was seen to be porting? Both these vessels say they were going about three-and-a-half to four knots, and I have no reason to doubt that is the true story. I do not think they were going beyond the speed which the rule of the harbour lays down, which is four knots.

The story told on behalf of the *Seymolicus* is this: "We did not give a two-blast signal—we gave a one-blast signal; our vessel did not go off to port; and the story told about it is absolutely wrong, and as a matter of fact, instead of all this happening at a time when the *Lottie* was some hundred yards or so from us, it happened when the *Lottie* was not more than twenty-five or thirty yards from us." As I say, there is a mass of contradiction, but

there is another very important contradiction in the case. The master of the *Seymolicus* has had put to him paragraph 12 of the preliminary act and paragraph 3 of the statement of defence, and we have him absolutely denying the truth of the case deliberately put before the Court by his counsel and solicitors in the pleadings. That makes one uncomfortable, because one does not quite know where the statement of defence and preliminary act originated, and it is difficult to believe that they did not originate with the master. I have come to the conclusion that the weight of evidence is entirely on the side of the *Lottie*. I do not believe that the master of the *Seymolicus* intentionally gave a two-blast signal. I think it is extremely likely that he was alone on the bridge. He was steering, and it may be that he unintentionally and accidentally gave a double blast. That two short blasts were given is proved to my satisfaction. It is sworn by the plaintiffs that the *Seymolicus* not only did that, but ported and went off to starboard, and that is a credible story, whereas the story told by the *Seymolicus* is an impossible one. Therefore, taking the whole of the evidence, I accept the evidence given on behalf of the *Lottie* in preference to that given on behalf of the *Seymolicus*. That, however, does not conclude the case. Undoubtedly the rule applies that vessels meeting nearly end on, as these vessels were, shall pass port to port, and the *Lottie* starboarded. If I thought she starboarded, as the *Seymolicus* says she did, before the whistle of the *Seymolicus* was blown, then I should have held her to blame for starboarding under the circumstances. That is the story told by the *Seymolicus*—that the *Lottie* starboarded before the port helm signal, as the *Seymolicus* says, was blown; but, as I have said, I believe the plaintiffs' story that the first thing which was done was the blowing of the two blasts by the *Seymolicus*, which induced the *Lottie* to starboard instead of porting. Therefore I think the *Lottie* is exonerated from blame for doing that which would have been an infraction of the rules but for the mistaken signal given by the *Seymolicus*.

I do not think that the question of speed comes into this case, and my belief is that but for the two-blast signal these vessels would have passed port to port, and that the whole cause

1909

THE SEYMOLICUS.

Bargrave Deane J.

of the accident was the incident as to the whistles. But for that there would have been no collision; and I think that that signal was given at a moment when there was time for the *Lottie* to have cleared starboard to starboard but for the porting of the *Seymolicus*. The master of the *Seymolicus* said he did not port. He admits he intended to blow a port helm signal. Did he port? His story is this: he says there was a steamer, anchored, heading to the eastward, with her stem about 100 yards away from the buoy on the Loofie Baa, and he says he was making to pass fifty yards from that steamer's bow, in other words, about midway between that steamer's bow and the buoy, which would put the course fifty yards from the buoy. He says he kept his course and did not alter. There was no tide. He admits that the collision took place thirty to forty feet from the buoy. How did he get there unless he ported? I think it is manifest that there again I cannot accept the evidence of the master of the *Seymolicus*, and I am satisfied that he did port his helm, and ported it after a two-blast signal had been given, and the collision was brought about entirely by that. For these reasons I am of opinion that the *Seymolicus* is alone to blame, and that no fault is to be found with the *Lottie*.

I ought to say, on the question of whether this is a narrow channel, that I asked a question of the master of the *Seymolicus*, and he said that this was a place in which it would have been right for the *Lottie* to have made a cast out to the eastward in order to come round and approach the fish market. If that is the case, nobody can say this is a narrow channel to which the narrow channel rule applies.

Solicitors for plaintiffs, the owners of the *Lottie*: *Dubois & Co., for Chamberlin & Talbot, Great Yarmouth.*

Solicitors for defendants, the owners of the *Seymolicus*: *Pritchard & Sons, for J. Wallace, Sunderland.*

T. L. M.

In the Estate of WILLIAM LANCELOT WALKER.

1909
Feb. 1.

Probate—Practice—Presumption of Death—Surrounding Circumstances—Form of Oath.

The Court will, under certain circumstances, modify the usual form of oath in a case of presumption of death.

Where a passenger on a cross-channel steamer was missed when within about four miles from the port of arrival in France, the Court allowed a creditor, who was seeking administration, to swear that he believed the person in question died on that occasion, upon an affidavit that notice of motion had been duly served upon the wife and daughter of the presumed deceased.

Motion by a creditor for leave to presume death.

William Lancelot Walker was a registrar of births, deaths, and marriages at Reading, in the county of Berks, where he resided, and he was fifty years of age at the time of his disappearance. He was married, and had one daughter of the age of twenty-one years and upwards.

In the month of May, 1905, and for some time prior thereto, William L. Walker was in financial difficulties, owing principally to his speculations on the Stock Exchange; and on May 13, 1905, he left Reading for the ostensible purpose of going to Horsham, in the county of Sussex, but he never reached that place.

On May 16, 1905, a letter was received by the chief constable of Reading from His Britannic Majesty's consul at Calais, stating that a gentleman, supposed to be a resident of Reading, was reported to be missing from the French mail steamer *Le Nord*, which left Dover for Calais about 11 p.m. on May 13, 1905. The consul's letter also gave particulars of certain articles, belonging to the gentleman referred to, which were found on board the steamer and which had been returned to Reading.

A further letter, dated May 19, 1905, was received by the chief constable of Reading from the consul, enclosing a letter, in the handwriting of William L. Walker, addressed to a firm of stockbrokers, upon which was written, at the foot thereof, in the same handwriting, but in pencil, the following

1909

WALKER, IN THE ESTATE OF.

words:—"God forgive me, I can't bear it any longer. I must jump in."

The gentleman above referred to was seen on the steamer by two seamen, named Wadoux and Moroch respectively, and the latter had identified a photograph of W. L. Walker as being a photograph of the gentleman who was missing from the steamship as before stated. The articles referred to in the consul's letter, namely, a coat and hat and bag, were found lying on a seat upon the arrival of the steamer at Calais, but the owner of them was missed and he did not disembark. The captain of the vessel concluded that he had thrown himself into the water, and, as it was dark, no efforts could be made to search for the body, which was in fact never recovered.

No tidings had since been heard of William L. Walker, and his wife and daughter declined to intermeddle in his affairs.

No advertisements had been inserted in any newspapers and no notices had been issued with a view to discovering if W. L. Walker were alive.

William L. Walker was said to be entitled under the will of his father, William Walker, which was proved on March 11, 1882, to a reversionary interest in a sum of 600*l.* expectant on the death of his aunt, now about seventy-three years of age.

The applicants on the present motion were Messrs. J. & C. Simmonds & Co., bankers, Reading, with whom William L. Walker had an account, which at the time of his disappearance was overdrawn to the extent of 134*l.* 1*s.* 9*d.*, the amount owing to June 30, 1908, being 154*l.* 19*s.* 7*d.*

By a memorandum of deposit dated November 1, 1901, William L. Walker deposited with his bankers six certificates in his name, representing forty shares of 10*l.* each in the Municipal Permanent Investment Building Society, to secure any sum that might be owing by him to his bankers at any time. The above facts were proved by the affidavits of John Simmonds and others.

The parties to this motion were, besides the applicants, Mrs. W. L. Walker, of Highclere, St. Albans, and Miss A. Walker, of Tudor Mansions, Kensington, the wife and daughter of William L. Walker.

1909

WALKER, IN THE ESTATE OF.

Le Bas, for the applicants, moved for leave to presume the death of William Lancelot Walker as having occurred on or since May 13, 1905, and for liberty to swear the date of the death accordingly, in the usual form.

The case came on before Bargrave Deane J. and was adjourned to see whether the applicants would not apply for a grant in the ordinary way, swearing that the man was dead.

On the application being now renewed,

SIR GORELL BARNES, PRESIDENT, said: If this man did not die on the night in question, he may have simply disappeared so as to make people believe he is dead. If he was not drowned on the night in question, there is no presumption at all that he is dead. The wife and daughter have declined to take a grant, and have said that their reason for so refusing is that they have heard that he is alive.

Le Bas. If it had not been for the statement of the wife and daughter, the applicants would have been advised to swear that the man died on the night in question. But in face of the position taken up by the wife and daughter, who say that they have received information that the man has been seen alive, how can a creditor be advised, or be expected, to swear that the man is dead?

SIR GORELL BARNES, PRESIDENT. Under the circumstances, I will allow the applicants to swear to their belief in the death; but they must ascertain where the steamer was when the man was last seen on board, and they must state the date definitely. If it will salve their consciences, they may take the order in that form, on proof of service of the notice of motion.

Solicitors: *Rooke & Sons, Agents for Brain & Brain, Reading.*

H. D. G.

C. A.
1909
Feb. 26.

[IN THE COURT OF APPEAL.]

In re HAILSTONE.
HOPKINSON *v.* CARTER.

Probate — Practice — Summons — Service — Probate Contentious Rules, 1862, *r.* 100—*Rules of Supreme Court, Order* LIV., *r.* 4E—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 16, 23—*Judicature Act*, 1875 (38 *&* 39 *Vict. c.* 77), *s.* 18.

Rule 100 of the Probate Contentious Rules, 1862, remains in force notwithstanding Order LIV., r. 4E, of the Rules of the Supreme Court, and therefore in the case of a summons in a probate action one clear day's service before the return thereof is sufficient.

APPEAL from an order of Sir Gorell Barnes, President.

The question on this appeal was whether a summons issued in a probate action must be served one clear day or two clear days before the return thereof, and this question depended on the question whether the practice was regulated by r. 100 of the Probate Contentious Rules, 1862 (1), or by Order LIV., r. 4E, of the Rules of the Supreme Court. (2)

The action was brought to obtain probate of a contested will.

By an order for directions dated June 26, 1908, it was ordered

(1) The material rules of the Probate Contentious Rules, 1862, are as follows:

"98. A summons may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding.

"99. A printed form must be obtained and filled up with the object of the summons, and a proper fee stamp affixed. It must then be taken to the clerk of the papers, who will insert in the blank left in the printed form the time when the summons is to be made returnable, and get the summons signed by a registrar.

"100. The clerk of the papers is then to enter the name of the cause or matter and of the agent taking out the summons in the summons book, and return the summons (with the stamp cancelled), signed, to the applicant who is to serve a copy on the party summoned. This copy must be served on the party summoned one clear day at least before the summons is returnable, and before 7 P.M. On Saturdays the copy of the summons is to be served before 2 P.M."

(2) Order LIV., r. 4E, provides as follows: "Every summons, not being an originating summons to which an appearance is required to be entered, shall be served two clear days before the return thereof, unless in any case it shall be otherwise ordered. Provided that in case of summonses for time only, the summons may be served on the day previous to the return thereof."

that an affidavit of documents should be filed by each party within ten days from notice.

On December 4, 1908, an extension of the time for filing the affidavit was granted to each party, and subsequently a further extension was granted, which expired on January 8, 1909.

On February 3, 1909, the defendant issued a summons against the plaintiffs, asking that the action might be dismissed for want of prosecution, the plaintiffs not having filed any affidavit of documents.

This summons was served on the plaintiffs on the same day, and it was returnable on February 5, one clear day after service.

On February 5, the plaintiffs not appearing, the registrar made the order upon an affidavit of service being made by the defendant's solicitor.

On February 8 the President set aside this order as irregular.

The defendant appealed.

Grazebrook, for the appellant. The question is whether a summons issued in a probate action must be served two clear days or one clear day before it is returnable, and that depends on the question whether the practice is regulated by Order LIV., r. 4E, of the Rules of the Supreme Court, 1883, or by r. 100 of the Probate Contentious Rules, 1862. By s. 18 of the Judicature Act, 1875, all rules in the Probate Court are to remain in force in the High Court until altered or annulled by any Rules of Court made after the commencement of that Act. By the Rules of 1883 the orders and rules mentioned in Appendix O are annulled, but the Probate Rules of 1862 are not included therein. The result is that r. 100 is still in force and that only one clear day's service is required. The order of the registrar was therefore perfectly regular and ought not to have been set aside.

Barnard, K.C., and *Rayden*, for the respondents. In Coote and Tristram's Probate Practice, 14th ed. pp. 297, 355, it is stated that a summons must be served two clear days before the return thereof, and reference is made to the Rules of 1883. It is very desirable that the practice should be uniform, and having regard

C. A. 1909

HAILSTONE, *In re.* HOPKINSON *v.* CARTER.

to ss. 16 and 23 of the Judicature Act, 1873, it is submitted that Order LIV., r. 4E, ought to prevail, and that r. 100 of the Probate Contentious Rules was not intended to have any operation after the Rules of the Supreme Court came into force.

[They also contended that, assuming that their argument on the point of practice was not well founded, the respondents in the special circumstances of the case ought to be allowed a further extension of time for filing their affidavit of documents.]

COZENS-HARDY M.R. This appeal raises a question of practice and it is somewhat strange that it should only arise for decision in the year 1909. The point is shortly this: whether r. 100 of the Probate Contentious Rules, 1862, which contains a distinct statement that one clear day's notice is sufficient for a summons, is still in force, or whether it is abrogated by the well-known rule which requires two clear days' notice. I have asked the official of the Probate Court for his view of the practice, as I think that that is information of which the Court is entitled to avail itself. He informs me that it is the settled practice that one day's notice is sufficient. It may be, nevertheless, that such a practice is inconsistent with the established rule of the Court, and we must hold that which we believe to be correct; but in our opinion that practice is quite right. The rules in the Annual Practice contain many provisions which apply expressly to the Probate Court. They contain other provisions which have nothing to do with the Probate Court practice. But when we find distinct rules in the Probate Court dealing with a particular subject-matter, they, in my opinion, remain in force notwithstanding that there may be a different rule dealing with that subject-matter in the Rules of the Supreme Court. Sect. 18 of the Judicature Act, 1875, appears to me sufficient to deal with this case. It says that all rules in the Court of Probate in force at the time of the commencement of the Act "shall remain and be in force in the High Court and in the Court of Appeal respectively until they shall respectively be altered or annulled by any Rules of Court made after the commencement of this

Act." This r. 100 has never been altered or annulled; it has been acted upon ever since, and I see no reason to doubt that it is applicable to the proceedings in the Probate Court. That being so, the order made by the President setting aside the order of the Master must be discharged. We direct that the action be dismissed as proposed by the registrar, unless the plaintiffs within fourteen days file the affidavit of documents required by the order for directions. That concession can only be granted to the plaintiffs on the terms that they pay the costs before the President and the costs of this appeal.

BUCKLEY L.J. The question here is whether Probate Rule 100 of 1862, which names one clear day, or Order LIV., r. 4E, which names two clear days, as the period for the return of a summons, is to prevail. The summons is in the Probate Court, and in order to determine this question it is necessary to refer to one or two sections of the Judicature Acts. By s. 16 of the Judicature Act, 1873, there was transferred to the High Court, among other things, the jurisdiction of the Court of Probate, and s. 23 of that Act provides that this jurisdiction " shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such rules and orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such rules or orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts." That was followed by s. 18 of the Act of 1875, which provides that all rules in the Court of Probate " shall remain and be in force in the High Court and in the Court of Appeal respectively until they shall respectively be altered and annulled by any Rules of Court made after the commencement of this Act." Then came the Rules of 1883. These Rules by Appendix O repealed a vast number of rules therein specified, but among them are not included the Probate Rules of 1862. Among the rules of 1883 was contained Order LIV., r. 4E, which provides that " every summons, not being an originating summons to which an appearance is required to be entered, shall be served

C. A. 1909

HAILSTONE, *In re.* HOPKINSON *v.* CARTER.

Buckley L.J.

two clear days before the return thereof, unless in any case it shall be otherwise ordered."

The question is what is the effect of that succession of statutory and quasi-statutory provisions and rules ? In my judgment the effect is that Probate Rule 100 of 1862 has never been annulled. It is a subsisting rule of the Court of Probate, whose jurisdiction has been transferred to the High Court, and it is a rule which is to remain in force until it is altered or annulled. I do not think that Order LIV., r. 4E, did repeal it, for it is only to apply "unless otherwise ordered." The result is that r. 100 prevails and that Order LIV., r. 4E, does not prevail. I am pleased to think that the practice which we have laid down is that which has been consistently followed by the Court of Probate. The order of the late President must be discharged, and I agree as to the order which the Master of the Rolls has suggested should be substituted for it.

Appeal allowed.

Solicitors: *Carter & Co.; Nye, Moreton & Clowes.*

H. B. H.

Considered. WINNAN *v.* WINNAN.
[1948] 2 All E.R. 862.

[IN THE COURT OF APPEAL.]

C. A.
1909
Jan. 18, 19;
Feb. 9.

HARRIMAN *v.* HARRIMAN.

Divorce—Wife's Petition — Effect of Separation Order under Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 5.

In July, 1905, the respondent deserted the petitioner and never returned to her or contributed to her support. In March, 1906, a stipendiary magistrate, upon the complaint of the petitioner that the respondent had deserted her, made an order under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, that the respondent should pay a specified weekly sum to the petitioner for her support; the order contained also a provision under s. 5 (*a*) of the Act that the petitioner should no longer be bound to cohabit with the respondent. In 1907 the respondent committed adultery, and in December, 1907, the petitioner presented a petition for dissolution of the marriage on the grounds of adultery and of desertion for two years without reasonable excuse:—

Held, that the effect of the non-cohabitation clause in the magistrate's order was to prevent the continuance of the desertion after the date of the order; that there had therefore not been desertion without reasonable excuse for two years by the respondent so as to satisfy the requirements of s. 27 of the Matrimonial Causes Act, 1857; and that the petitioner was not entitled to a decree for dissolution of the marriage.

Dodd v. *Dodd*, [1906] P. 189, approved.

Smith v. *Smith*, [1905] P. 249, and *Failes* v. *Failes*, [1906] P. 326, overruled.

Where a married woman applies for an order under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, upon the ground of desertion only, a non-cohabitation clause is in general an inappropriate remedy and should not be inserted in the order.

APPEAL of the petitioner from a decision of Bucknill J. dismissing her petition for a dissolution of marriage on the grounds of adultery and desertion.

The parties were married in 1896. On July 18, 1905, the respondent left the petitioner, and never returned to her. In March, 1906, the petitioner made a complaint under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895 (1), that her

(1) By 58 & 59 Vict. c. 39, s. 4, "Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of s. 43 of the Offences against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than five pounds

C. A. 1909

HARRIMAN v. HARRIMAN.

husband had unlawfully deserted her. On March 9, 1906, the magistrate found the complaint to be true, and made an order under s. 5 of the Act that the respondent should pay to the petitioner the weekly sum of 25*s.*, and that the petitioner should no longer be bound to cohabit with the respondent. In December, 1907, the petitioner presented this petition for a dissolution of the marriage on the grounds of adultery and desertion. At the trial before Bucknill J., at which the respondent did not appear, the adultery of the respondent was clearly proved, but the learned judge, on the authority of *Dodd* v. *Dodd* (1), dismissed the petition on the ground that desertion for two years without reasonable excuse had not been proved. The petitioner appealed.

Upon the case first coming on, the Court directed that the papers should be sent to the King's Proctor in order that both sides of the case should be properly presented to them. On

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or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any Court of summary jurisdiction . . . . for an order or orders under this Act . . . ."

By s. 5, "The Court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.:—

"(*a*) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty):

"(*b*) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant:

"(*c*) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the Court or third person on her behalf, such weekly sum not exceeding two pounds as the Court shall, having regard to the means both of the husband and wife, consider reasonable:

"(*d*) A provision for payment by the applicant or the husband, or both of them, of the costs of the Court and such reasonable costs of either of the parties as the Court may think fit."

(1) [1906] P. 189.

December 14, 1908, the case came on before Cozens-Hardy M.R. and Fletcher Moulton and Farwell L.JJ., but at an early stage of the arguments the Court, having regard to the importance of the question and to the conflict of authority upon the point, directed the case to be argued before the Full Court of Appeal.

Emery and *E. S. Hart*, for the appellant. There have been conflicting decisions in the Courts of first instance on the point raised in this case: *Levy* v. *Levy* (1); *Smith* v. *Smith* (2); *Dodd* v. *Dodd* (3); *Failes* v. *Failes*. (4) In order to understand the effect of ss. 4 and 5 of the Act of 1895 it is necessary to consider the law as it existed prior to the passing of the Matrimonial Causes Act, 1857, and the provisions of that and subsequent statutes in pari materia. Before the Act of 1857 the Ecclesiastical Courts had jurisdiction in matrimonial matters (except that they could not grant a divorce a vinculo matrimonii), and could grant a wife a divorce a mensa et thoro on the proof of adultery or cruelty on the part of the husband. By s. 6 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the Court for divorce and matrimonial causes was established, and the jurisdiction of the Ecclesiastical Courts in respect of divorces a mensa et thoro, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, was transferred to the Court so established; and by s. 7 it was provided that no decree for a divorce a mensa et thoro should thereafter be pronounced, but in cases where that decree might have been pronounced a decree for judicial separation might be pronounced, which should have the same effect. Sect. 16 of the Act provided that a sentence of judicial separation might be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards. Prior to that Act desertion was not a ground for divorce a mensa et thoro, but there might in case of desertion have been an application for restitution of conjugal rights, restitution being, generally speaking, a matter of right as

(1) (1904) 21 Times L. R. 157.
(2) [1905] P. 249.
(3) [1906] P. 189.
(4) [1906] P. 326.

C. A. 1909

HARRIMAN v. HARRIMAN.

to which there were very few defences. By s. 27 a husband was empowered to petition for a decree for dissolution of marriage on the ground of adultery by his wife, and the wife was empowered to petition for such a decree on the ground of incestuous adultery, or bigamy with adultery, or of certain criminal offences by the husband, or of adultery by him coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion without reasonable excuse for two years or upwards. If the wife has obtained a judicial separation on the ground of cruelty, and the husband is guilty of adultery, the wife can then petition for dissolution of marriage, and in such a case, when she comes to the Court to ask for a divorce, she has not again to prove the cruelty. The adultery on the part of the husband having been proved, she may rely on the previous decree for judicial separation as establishing the cruelty: *Bland* v. *Bland*. (1) That decree is in the nature of an estoppel between the parties.

The same rule must apply in the case of desertion. By s. 5 of the Act of 1895 a Court of summary jurisdiction may, in any case within s. 4 of the Act, make an order containing a provision that the applicant shall be no longer bound to cohabit with her husband, which is to have the same effect in all respects as a decree for judicial separation on the ground of cruelty. Therefore in the present case the wife, upon proof of adultery by her husband and of the order made by the magistrate, was entitled to a decree for dissolution of marriage. By s. 4 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), it was provided that, if a husband should be convicted of an aggravated assault within the meaning of s. 43 of 24 & 25 Vict. c. 100 upon his wife, the Court or magistrate before whom he was convicted, if satisfied that the future safety of the wife was in peril, might order that the wife be no longer bound to cohabit with her husband, and that such order should have "the force and effect in all respects of a decree of judicial separation on the ground of cruelty." The object of inserting the words "on the ground of cruelty" would appear to have been to assimilate the order to the decree of judicial separation

(1) (1866) L. R. 1 P. & M. 237.

on that ground in all respects, including the effect that, in the event of subsequent adultery by the husband, the wife might obtain a divorce on proof of the adultery and the decree for judicial separation, without again proving the cruelty. From the passing of that Act down to 1884 the grounds for judicial separation and divorce remained unaltered. In 1884 the Legislature seem to have come to the conclusion that, when the desertion of a wife by her husband was clearly persistent, it was a hardship on the wife to compel her to wait until she had been deserted for two years before she could obtain a judicial separation, and they provided in s. 5 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), that if there had been an order for restitution of conjugal rights and the respondent failed to comply therewith he should be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation might be forthwith instituted and sentence therein pronounced, although the period of two years had not elapsed since the failure to comply with the decree for the restitution of conjugal rights; and, further, that when the husband had, in addition to such failure, been guilty of adultery the wife might petition for, and the Court might pronounce, a decree nisi for dissolution of marriage on the ground of adultery coupled with desertion.

The order for restitution of conjugal rights is for the most part an order of course, if a demand for restitution of conjugal rights has not been complied with. The rule in the Ecclesiastical Courts was that either party was entitled to a decree for restitution of conjugal rights, unless the other party could make out a case for judicial separation. But since *Russell* v. *Russell* (1) the same rule may not apply.

By s. 1 of the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), power was given to justices, on the application of a wife whose husband had wilfully refused or neglected to maintain her and had deserted her, to make an order upon him for payment to her of a weekly sum not exceeding 2*l*. The making of such an order did not prevent the husband from returning to his wife and so avoiding

(1) [1897] A. C. 395.

C. A. 1909

HARRIMAN v. HARRIMAN.

the order. That Act was repealed by s. 12 of the Summary Jurisdiction (Married Women) Act, 1895.

It is contended that, having regard to the pre-existing law on the subject, the effect of an order made under s. 5 (*a*) of the Act of 1895 is to put the wife in the same position as a woman who has obtained a judicial separation on the ground of cruelty, and, therefore, if the husband after such decree is guilty of adultery, she is entitled to a divorce. There is nothing in the terms of ss. 4 and 5 of the Act of 1895 to limit the power of a magistrate to make an order under s. 5 (*a*) to cases of cruelty or assault. Under those sections he may make that order in any of the cases enumerated in s. 4.

Again, the desertion may be regarded as continuing, notwithstanding the making of the order. If, after the making of such an order, the husband returns to the wife and she is willing to receive him, the order is at an end, being intended for the protection of the wife; but as long as the order remains in force and the husband makes no offer to return the desertion must be taken to continue. If the husband who has deserted his wife has so conducted himself that she has been obliged to obtain an order under s. 5 (*a*) for her protection, he may very well be regarded as continuing to desert her: see *Smith* v. *Smith* (1); *Failes* v. *Failes*. (2)

Assuming that the magistrate had no power to make an order under s. 5 (*a*) on the ground of desertion, then the order was a nullity, and, if so, there was desertion for more than two years, for in that case the desertion clearly continued after the date of the order. [They also cited *Reg.* v. *Leresche* (3); *Parkinson* v. *Parkinson* (4); *Nott* v. *Nott* (5); *Gibson* v. *Gibson*. (6)]

Sir W. S. Robson, *A.-G.*, and *J. Harvey Murphy* (*C. J. Willock* with them), for the King's Proctor. An order under s. 5 (*a*) of the Act of 1895 is by the Act to "have the effect in all respects of a decree of judicial separation on the ground of cruelty." It cannot have been intended that a provision for non-cohabitation should be made in a case of mere desertion, to which it is

(1) [1905] P. 249.
(2) [1906] P. 326.
(3) [1891] 2 Q. B. 418.
(4) (1869) L. R. 2 P. & M. 25.
(5) (1866) L. R. 1 P. & M. 251.
(6) (1859) 29 L. J. (P. & M.) 25.

inapplicable, the intention of the Act of 1895 being to enlarge the wife's remedy in cases of cruelty. But in any event the result contended for by the petitioner does not follow. To ascertain what is the effect of a decree of judicial separation the Matrimonial Causes Act, 1857, must be looked at. By ss. 7 and 16 of that Act the decree of judicial separation is to have the same effect as the divorce a mensa et thoro under the old law had, and "such other legal effect as herein mentioned." The divorce a mensa et thoro put an end temporarily to all conjugal rights and prohibited either party from demanding cohabitation. It is impossible to suppose that after such a decree desertion could be considered to continue. A husband cannot be said to be deserting his wife when he is not allowed to come back to her. The "other legal effect herein mentioned" refers to the provisions of ss. 25 and 26 of the Act with respect to property of the wife. The other effects of the decree of judicial separation, besides the cessation of conjugal rights, must be sought in the Act, and in the Act only, and it is not admissible to superadd to those effects another, namely, that on production of the decree, if adultery be subsequently proved, the wife can obtain a decree of dissolution of marriage. The petitioner has raised what is a mere practice of the Divorce Court, which it is open to that Court to change, to the position of a legal effect of a decree for judicial separation. The practice of the Divorce Court in this respect is adopted to save the expense and trouble of unnecessarily proving again what has already been proved before it. By s. 31 of the Act of 1857 the Court has to satisfy itself of the truth of the allegations of a petitioner, and it is for the Court to say what will ordinarily satisfy it, but it can, in any case where it thinks fit to do so, require further proof: *Judd* v. *Judd*. (1)

The order of the justices cannot be, quoad the desertion, an estoppel inter partes for this purpose, and if it were, such an estoppel would not bind the King's Proctor. The Court cannot be estopped by its decree for judicial separation, and if the King's Proctor intervenes in the matter he cannot be estopped. The doctrine of estoppel as applicable to proceedings in the Divorce Court cannot be prayed in aid as against the Court in

(1) [1907] P. 241.

C. A. 1909

HARRIMAN v. HARRIMAN.

the exercise of its duty to satisfy itself, when it has to deal with a petition for divorce, that the legal grounds for a divorce exist: *Howarth* v. *Howarth*. (1) [They also cited *Butler* v. *Butler* (2); *Sweet* v. *Bishop of Ely*. (3)]

Emery, in reply. The proper inference from the language of ss. 4 and 5 of the Act of 1895 is that the Legislature determined to regard as cruelty such desertion as a magistrate or justices in his or their discretion might think sufficient to justify the making of a separation order. The fact that the King's Proctor can always intervene is an adequate protection against any possible danger that a separation order under the Act of 1895 may be improperly used in support of a wife's subsequent petition for a divorce.

Cur. adv. vult.

Feb. 9. COZENS-HARDY M.R. read the following judgment:— This appeal raises an important question as to the effect of the Summary Jurisdiction (Married Women) Act, 1895, upon the jurisdiction and practice of the Divorce Court.

On March 9, 1906, upon a complaint made to a metropolitan police magistrate by Mrs. Harriman that her husband did unlawfully desert her, the magistrate adjudged that the matter of the said complaint was true, and ordered that the applicant be no longer bound to cohabit with her husband, and that the husband should pay to his wife 25*s*. a week, with the costs of the application. The husband was served with the summons, but did not appear. On December 24, 1907, the wife petitioned for a divorce, alleging desertion from July 18, 1905, for two years and upwards, coupled with adultery. At the trial before Bucknill J. the husband did not appear. The adultery was proved, but the learned judge, following the decision of the President in *Dodd* v. *Dodd* (4), dismissed the petition. Against this decision the present appeal is brought.

The jurisdiction to grant a divorce is conferred by s. 27 of the Matrimonial Causes Act, 1857. If the wife is petitioner she must allege and prove adultery coupled (1.) with cruelty or (2.)

(1) (1884) 9 P. D. 218.
(2) [1894] P. 25.
(3) [1902] 2 Ch. 508.
(4) [1906] P. 189.

with desertion without reasonable excuse for two years or upwards (s. 27), and the Court is required to "satisfy itself" as to the facts alleged (s. 29). The necessity for the continuance of desertion for two years has been expressly altered in one case only, namely, where the respondent has failed to comply with a decree for restitution of conjugal rights (s. 5 of the Act of 1884). The present case does not fall within that exception, and the petitioner's right to a divorce must depend upon s. 27 of the Act of 1857. It was contended, though not very strenuously, that desertion without reasonable excuse for more than two years had been proved. But in my opinion it is impossible that the petitioner, who in March, 1906, obtained an order that she should no longer be bound to cohabit with her husband, can be allowed, in the absence of any further evidence on her part, to say that her husband's desertion continued after that date. By obtaining the order she not only expressed her desire that cohabitation should not be resumed, but effectually prevented it. The order cannot have a less effect than a separation deed made after desertion, and such a deed would prevent the period of desertion from running on.

But it is contended that, although cruelty was neither alleged nor proved, the effect of s. 5 (*a*) of the Act of 1895 is to make the non-cohabitation provision in the magistrate's order have "the effect in all respects of a decree of judicial separation on the ground of cruelty," and thus indirectly to treat the desertion as equivalent to cruelty, and thus to justify a divorce. I am unable to follow this argument. What is the effect of a decree of judicial separation on the ground of cruelty? It has the same force and the same consequences as a divorce a mensa et thoro under the old law (ss. 7 and 16), and it makes the wife a feme sole so far as property and contract and suing and being sued are concerned (ss. 25 and 26). Beyond this it has no absolute effect. It may perhaps operate by way of estoppel inter partes, so as to prevent the husband from thereafter denying that he has been guilty of cruelty, though I desire to express no opinion on that point. It cannot in any way estop the Court. For the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The

C. A. 1909

HARRIMAN v. HARRIMAN.

Cozens-Hardy M.R.

public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied. The utmost effect by way of estoppel which the order of March, 1906, can have is to prove desertion at that date, but not desertion for two years. If the order had been made on complaint of cruelty, and it had been adjudged that the matter of the complaint was true, the Divorce Court might perhaps have granted a divorce on proof of subsequent adultery.

The result is that I agree entirely with the judgment of the President in *Dodd* v. *Dodd* (1), and I do not think it necessary to discuss minutely the earlier statutes prior to 1895, which are fully dealt with by the President. I will only add a few words upon the language of ss. 4 and 5 of the Act of 1895. I find in s. 4 several distinct acts or omissions on the part of the husband which may justify an order under the Act. Most of these involve cruelty. One, namely, desertion, does not necessarily involve cruelty. And I find in s. 5 jurisdiction to make all or any of four distinct provisions. I am not satisfied that s. 5 ought not to be read so as to limit the non-cohabitation provision to cases of cruelty as distinct from mere desertion. But, however that may be, I feel strongly that the magistrates ought not to treat it as a matter of course, a mere matter of form, to insert that provision; and if that provision is not inserted, the difficulties of which this case is an illustration could not arise. The appeal must be dismissed.

VAUGHAN WILLIAMS L.J. read the following judgment:—This appeal raises the question of what is the effect of a separation order under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, obtained upon a complaint of desertion, and no more. Sect. 4 of that Act provides for a separation order based on four distinct grounds respectively, and s. 5 sets forth the provisions, any of which may be included in the separation order. One of these provisions is that the applicant is no longer bound to cohabit with her husband, "which provision while in force shall have the effect in all respects of a decree of judicial

(1) [1906] P. 189.

separation on the ground of cruelty." [The Lord Justice read ss. 4 and 5, and continued :—]

It was urged before us, first, that the separation order was not inconsistent with the continued running of the desertion upon complaint of which the magistrate's order relieving the wife from the duty of cohabitation was based. The argument was put in this way. True, it was said, that the order in a sense renders voluntary desertion by the husband impossible because the order prevents his return to cohabitation except by the consent of the wife, but the magistrate's order is based upon the assumption that the husband's desertion as proved before him was of such a character as to justify a non-cohabitation order, and it may be argued that a husband who by his conduct puts his wife in a position that she cannot be called upon to continue cohabitation is as much deserting his wife as if he absented himself with the intention to desert, and that, if this is so, the magistrate's order negativing the wife's obligation to cohabit ought not to prevent the continuance of the running of the desertion on the complaint of which the magistrate's order was based. I think that in principle this argument is sound, but, for reasons which I will presently give, I do not think that the facts of this case admit of the application of this principle.

The next ground urged on behalf of the petitioner was that even though there was no evidence of cruelty brought before the Court on the hearing of the petition, yet on proof of adultery by her husband she was entitled to a decree for dissolution of marriage by reason of the estoppel arising on the separation order in the police court. It was argued that, inasmuch as it was decided in *Bland* v. *Bland* (1) that where a wife obtained in the Divorce Court a decree of judicial separation on the ground of cruelty and the husband subsequently committed adultery she could obtain a decree for dissolution of marriage on proof of the adultery and of the decree for judicial separation, and inasmuch as in *Finney* v. *Finney* (2) estoppel was held to prevent a wife from setting up in a petition for dissolution the same charges of cruelty which she had alleged and failed to prove on a petition for judicial separation, which was upon such failure of proof

(1) L. R. 1 P. & M. 237. (2) (1868) L. R. 1 P. & M. 483.

C. A. 1909

HARRIMAN v. HARRIMAN.

Vaughan Williams L.J.

dismissed, the same result ought to follow from the proof of the magistrate's order, and that inter partes cruelty ought to be taken to be conclusively proved by the proof of such order, because of the words contained in s. 5 (*a*), "a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty)." This seems prima facie right. The answer by the Attorney-General to this argument was that, although estoppel might arise between the parties, no such estoppel bound the Court, for s. 31 of the Act of 1857 provides for pronouncing a decree for dissolving marriage in case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and that, if the Court was not satisfied, that was a sufficient reason for dismissing the petition notwithstanding the estoppel inter partes.

It occurred to me that, if the separation order by the magistrate was inter partes conclusive evidence, the Court could not dismiss the petition on the ground of not being satisfied unless the Court had some evidence before it rebutting the fact concluded by the estoppel, but I think this view was wrong. I think in the present case the Court had before it materials upon which it could say it was not satisfied—first, the fact that no cruelty was alleged or proved before the magistrate, but only desertion and no aggravating circumstances; and, secondly, that in the petition in the High Court the only allegations against the husband are that on July 18, 1905, the husband left the petitioner and has ever since lived separate and apart from her and deserted her without reasonable excuse for two years and upwards, and that the husband in July and October, 1907, committed adultery. There is no allegation of cruelty, and the only question of fact to be decided on the petition was not proved, but, on the contrary, disproved by the production of the magistrate's order, which by reason of preventing cohabitation negatived the possibility of the husband returning to the wife unless by her consent. Moreover, the judgment of a Court of competent jurisdiction is conclusive between the parties only as to matters precisely and directly alleged on the face of the record, and also with reference to the grounds of the decision,

provided that from the judgment itself the actual grounds of the decision can be clearly discovered: see the judgment of Mellish L.J. in *Alison's Case*. (1) Unless, therefore, the principle can be applied which I have already mentioned, that where the conduct of the husband is such that the wife cannot reasonably be expected to cohabit with him—I use "cohabit" here both in the narrow sense of living under the same roof or in a common house and also in the wider sense of having conjugal relations as man and wife—there may be desertion by the husband, whose conduct caused the separation, whether separation brought about by the wife absenting herself because she could no longer endure to live with her husband, or by a non-cohabitation order of the magistrate, the result must be that the separation order puts an end to desertion by the husband so long as that order remains in force. There seems to be authority for the contention, but inasmuch as in this case there is nothing to shew that there was any evidence before the magistrate of conduct such as I have just described by the husband rendering it unreasonable to expect or call upon the wife to live with her husband, I think the judgment of Bucknill J. must be supported: see *Sickert* v. *Sickert* (2), which case, although it is very different from the present by reason of the conduct of the husband which led the wife to withdraw from cohabitation and leave the house, and which the Court held sufficient to justify the wife in leaving the house and nevertheless to constitute desertion by the husband, who by his conduct forced her to leave it, yet does justify the proposition that, if the situation brought about by the conduct of the husband forces the wife to leave the house, this may constitute desertion by the husband. The principle is right, but I find no evidence or facts justifying this conclusion. I think the judgment of Bucknill J. must be supported and this appeal dismissed.

I wish to say that I am not satisfied that a non-cohabitation order ought not to be made in cases where the complaint is of desertion without allegation of "persistent cruelty," without any mention of the cruelty of the kinds mentioned in s. 4 as bases of complaint on which separation orders might be made. I think

(1) (1873) L. R. 9 Ch. 1, at p. 25. (2) [1899] P. 278.

C. A. 1909

HARRIMAN v. HARRIMAN.

Vaughan Williams L.J.

that, if the wife is intended to live separately from her husband, the non-cohabitation order in its narrow sense may be very necessary, lest he should molest her by his presence. Moreover, I think that "cohabit" in s. 5 covers cohabitation in the narrow sense as well as in the wider. This subject is fully dealt with in *Bradshaw* v. *Bradshaw* (1), which seems to shew that cohabitation is frequently used in the above case in what is called the narrow sense of living in a common home or common residence, which is regarded as sufficient evidence of conjugal relations: see also *Fitzgerald* v. *Fitzgerald* (2); *Reg.* v. *Leresche.* (3)

FLETCHER MOULTON L.J. read the following judgment:—The petition of the appellant in this case is in the ordinary form of a wife's petition for divorce, founded upon desertion and adultery on the part of her husband. There is no dispute or doubt as to the facts of the case. The adultery has been open and persistent, and no question arises as to it. It is the facts of the desertion that raise the important legal question which we have to decide.

The matrimonial offence known as desertion must, by the Act of 1857, have continued for a period of not less than two years up to the date of the petition. It is true that by the Matrimonial Causes Act, 1884, this period can in practice be shortened by the innocent spouse applying for and obtaining an order for the restitution of conjugal rights. If the offender refuses to obey this decree, he commits a matrimonial offence equivalent to the desertion for two years which had previously been necessary in order to found a petition for divorce. But nothing of this kind has occurred in the present instance, and, therefore, although considerable reference was made to the Act of 1884 in the argument, it is in my opinion irrelevant to the question before us.

The desertion in the present case commenced on July 18, 1905, and the husband has not returned to cohabitation. Inasmuch as the petition is dated December 24, 1907, the interval would be adequate if desertion in the legal sense of the term was

(1) [1897] P. 24. (2) (1869) L. R. 1 P. & M. 694.
(3) [1891] 2 Q. B. 418.

continuous during that period. But it appears that on March 9, 1906, when the desertion had continued only about eight months, the petitioner made a complaint to a Court of summary jurisdiction under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, based upon this desertion, and obtained from the magistrate a summons to the respondent to appear on a certain day to answer the complaint. The respondent did not appear, and, after due proof of the matter of the complaint, the Court found that the matter of the said complaint was true, and made an order that the respondent should pay to the complainant the weekly sum of 25*s.*, and awarded 8*s.* costs. But that order also contained the following provision in its operative part:—"And it is ordered that the said applicant be no longer bound to cohabit with her husband the said defendant." It appears, therefore, that at the request of the petitioner the Court made an order which, if valid and effective, took away from the respondent the right to cohabitation. If that order was valid, there is, to my mind, no possible doubt that desertion by the husband in the legal sense of the term ceased at that date. It is impossible to hold that a husband is committing a marital offence by non-cohabitation when he has not the right to cohabit. Subject, therefore, to the question whether this portion of the order was valid, it afforded a complete answer to the allegation of desertion for the purposes of the petition.

To this the petitioner's counsel makes the following answer. So far from alleging that the magistrate's order is invalid in this respect, he relies upon it. But he points out that under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, an order containing the above provision (which I will call for shortness the non-cohabitation clause) "shall, while in force, have the effect in all respects of a decree of judicial separation on the ground of cruelty"; and he contends that such a decree, coupled with the unquestioned adultery, would entitle her to a decree of divorce just as much as desertion for two years coupled with the adultery. It is to be observed that this suggested answer is inconsistent with the petition and alters the grounds on which the divorce is claimed; but, as that is a matter of form and not of substance and might be remedied by an amendment

C. A. 1909.

HARRIMAN v. HARRIMAN.

Fletcher Moulton L.J.

of the petition in the proper manner, I shall not allow it to affect this judgment, and I shall treat the case as though it raised in a regular form the question whether a magisterial order under the Summary Jurisdiction (Married Women) Act, 1895, containing the non-cohabitation clause, forms an adequate ground for divorce if coupled with proof of the adultery of the husband. To decide this question it is necessary, in my opinion, to consider carefully the history of the legislation upon the subject.

The relief given to women in respect of matrimonial offences committed by the husband remained exclusively in the jurisdiction of the Divorce Court until the year 1878, when, by the Matrimonial Causes Act of that year, it was provided that, if a husband should be convicted summarily or otherwise of an aggravated assault upon his wife, the Court or magistrate before whom he should be so convicted might, if satisfied that the future safety of the wife was in peril, order that the wife should no longer be bound to cohabit with her husband. Such an order would in its operation place her substantially in the position of a wife who had obtained a decree of judicial separation from her husband. But it is clear that the Legislature intended to go further than this and to make such an order identical in its legal effect with an order for judicial separation, for it proceeds to enact specifically that such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty.

This language is so clear that to my mind there is no room for doubt as to its meaning. It means that in all Courts and for all purposes such an order shall be deemed to be the equivalent of a decree for judicial separation on the ground of cruelty obtained in the only manner in which it can be obtained, namely, by a decree of the Divorce Court. It must be remembered that this clause appears in an Act entitled "An Act to amend the Matrimonial Causes Act," that is to say, to amend the Act of 1857, which first placed jurisdiction to grant a divorce in a Court as opposed to Parliament alone. I have no doubt, therefore, that in any proceedings, whether in the Divorce Court or otherwise, the production of such an order must have the same value in all respects, evidential or otherwise, as the production of a formal decree for judicial separation on the ground of cruelty. One of

the most important consequences of the obtaining of such a decree is that it constitutes a binding estoppel between the parties as to the husband having committed the matrimonial offence of cruelty. To my mind it was plainly the intention as well as the effect of the language of the statute that an order made under it by a Court of summary jurisdiction should have a like effect. This provision has two important consequences. In the first place, it makes the magistrate's order producible in evidence under the same circumstances as a decree for judicial separation would be, and, secondly, it is a legislative recognition that the issue which the magistrate has to decide is equivalent to the matrimonial offence of cruelty. In thus providing, the Legislature appears to me to have acted most reasonably. It is the serious reproach of our existing divorce laws that the relief they grant is practically out of the reach of the working classes in this country by reason of expense and the absence of local Courts empowered to grant it. These provisions constitute a small step in the direction of reform in this respect. It seems to me to be most reasonable that, having proved the issue of cruelty before a Court of competent jurisdiction, the wife, probably a poor woman, should be able to rely upon it, and not necessarily be compelled to prove the commission of the cruelty afresh before the Divorce Court, should the adultery of her husband lead her to seek therein the more complete relief of divorce.

In 1886 the Legislature took up the question of the relief of married women deserted by their husbands, and it gave to the wife the right to summon her husband before two justices in petty sessions, or a stipendiary magistrate, and to obtain from them an order for the payment of a weekly allowance not exceeding 2*l.*, on proof that he had deserted her or had wilfully refused or neglected to maintain her and his family when able to do so. This statute is not, and does not purport to be, an Act amending the Matrimonial Causes Act, 1857. It did not in any way deal with the tie of matrimony or the right or duty of cohabitation. It simply gave to a Court of summary jurisdiction the power of compelling a husband to do his duty in the way of maintaining his wife and family if and so far as it was in his power to do so.

C. A. 1909.

HARRIMAN v. HARRIMAN.

Fletcher Moulton L.J.

We now come to the Summary Jurisdiction (Married Women) Act, 1895, under which the order was made in this case. This was an Act for repealing for the purpose of amending by re-enactment in an altered form the provisions of the Act of 1878 and the Act of 1886 to which I have already referred. I cannot agree with the dictum of the learned President of the Probate Division, in his judgment in *Dodd* v. *Dodd* (1), that this is not an Act which alters the Matrimonial Causes Acts as applicable to the Divorce Court. On the contrary, it appears to me impossible to deny that it is an Act which was intended to and did alter the Matrimonial Causes Acts. This would to my mind be sufficiently established by the fact that it repealed s. 4 of the Matrimonial Causes Act of 1878, of which the title is "An Act to amend the Matrimonial Causes Acts," and among the provisions of that section we find not only that jurisdiction is given to a Court of summary jurisdiction to make an order which shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty, but also that orders made under that section shall be subject to appeal to the Probate, Divorce, and Admiralty Division of the High Court of Justice. But its right to be regarded as an Act affecting the Matrimonial Causes Acts is further established by the fact that it re-enacts in an ampler form provisions such as those contained in s. 4 of the Act of 1878, retaining the appeal to the Probate, Divorce, and Admiralty Division of the High Court of Justice, and continuing until alteration or repeal the rules then already made as to such appeals. On examining the provisions of this Act we find that it deals both with cruelty to the wife and desertion or neglect to maintain her or her infant children, thus combining and amplifying the grounds upon which up to that time complaint could be made by the wife to a Court of summary jurisdiction under the Acts of 1878 and 1886. By a natural sequence the relief which the Court is empowered to give comprehends all the relief which it could give under those two Acts.

It is clear, therefore, that it was the intention of the Legislature to consolidate and amend the Act of 1886 and s. 4 of the

(1) [1906] P. 189.

Act of 1878, and accordingly these are entirely repealed by s. 12 of the Act. But to my mind it is clear also that the draftsman has effected this consolidation in a most imperfect way. He has enumerated the whole of the grounds on which a complaint can be made, and has gone on to provide that the Court to whom the application is made may give all or any of the relief which it was empowered to give under the two previous Acts. He has not perceived that by so framing the statute he has given jurisdiction to the Court to give the relief embodied in the non-cohabitation clause (which was perfectly suitable to applications on the grounds set forth in the Act of 1878) in cases of complaints of desertion to which it is wholly inapplicable and where it was never intended to be given. The mistake arose, no doubt, from the intention that s. 5 should state and delimit the whole of the powers given to the Court, and it was never contemplated that the Court would avail itself of the whole of those powers in every case. It was assumed that it would only grant such relief in each case as was suitable to the particular application before it. Unfortunately, however, there are no words thus limiting the exercise by the Court of the jurisdiction given to it, and the magistrate in the present case has made an order which contains the non-cohabitation clause upon an application based on desertion, that is to say that, although the complaint of the wife was that her husband had deserted her, part of the relief given is that he has no longer the right to go back.

By s. 5 (*a*) the Legislature re-enacts the provision that the non-cohabitation clause while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty. This indicates so clearly the intention that this relief should not be given, except on an application based upon a complaint of cruelty, that one is greatly tempted to reject it in the present case as being inconsistent with the order which sets out clearly that it is desertion alone of which the husband has been found guilty. We are not asked to do this in the present case, and if we do not do this we are bound, in my opinion, loyally to obey the provisions of the Act by giving to this separation order the effect in every respect of a decree of judicial separation on the ground of cruelty, and to look upon it as

C. A. 1909

HARRIMAN v. HARRIMAN.

Fletcher Moulton L.J.

creating an estoppel between the parties as to the husband having been guilty of this offence to the same extent as a decree granted by the Divorce Court would do. If we should have been bound to do so in the case of an order under the Act of 1878, I cannot think that we are less bound so to do in the case of an order made under the Act of 1895, in which the non-cohabitation clause appears.

It remains to consider the effect of a decree of judicial separation granted to the wife on the ground of cruelty in the case of a subsequent application by her for divorce based on proof of adultery committed by the husband. This involves an important question as to the rules of evidence in the Divorce Court. So far as the parties are concerned, I see no reason why the admissibility or effect of evidence should be different in that Court from what they are in the other branches of the High Court, but it does not follow that the effect of that evidence on the issue of the cause is to be determined in a like manner. By s. 31 of the Matrimonial Causes Act, 1857, the relief is made dependent on the Court being satisfied on the evidence that the case of the petitioner has been proved. "Proved" here means proved as a fact, and not merely proved inter partes. Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The Court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them. Hence the production of a decree for a judicial separation on the ground of cruelty is not as a matter of law sufficient to make it the judicial duty of the Court to accept as a fact that the respondent has been guilty of such cruelty; and if the circumstances under which the decree was obtained are such as to raise a doubt in the mind of the Court as to whether the cruelty was in fact committed, it would be entitled and bound to require such additional evidence as should be sufficient to convince it of the fact. But, although this is so, the respect paid to a judicial determination of a fact between parties (which in civil actions is evidenced by its creating a binding estoppel) would, I should presume, in ordinary cases lead the Court to consider the fact of the cruelty to be adequately established by the production of the decree.

Applying these principles to the present case, it is obvious that the Court was justified in holding that the magistrate's order was not sufficient to satisfy it as to the matrimonial crime of cruelty or the matrimonial crime of desertion for two years having been committed. The order itself shews that there never was any allegation or proof of the offence of cruelty having been committed, or that the desertion therein spoken of was desertion for a period of two years. The Court was therefore, in my opinion, entitled and bound to declare itself as not satisfied that the case of the petitioner had been proved. I desire to add, however, that in my opinion the Legislature intended that an order rightly containing the non-cohabitation clause, by reason of the complaint being based on a charge of cruelty by the husband which has been proved before it, is entitled to be treated by the Court as having the same evidential effect as between the parties as a decree of judicial separation granted by the Divorce Court itself on the ground of cruelty. This seems to me to be the intention of the Legislature clearly expressed in the Act, and the Courts are bound to give to that language its full effect. I therefore agree that this appeal should be dismissed.

FARWELL L.J. read the following judgment:—I am of opinion that the judgment of the President in *Dodd* v. *Dodd* (1), which Bucknill J. has followed in the present case, was correct. Divorce a vinculo matrimonii was unknown to our law, both civil and ecclesiastical, before the Act of 1857, and could only be obtained by Act of Parliament. Divorce a mensa et thoro could be obtained in the Ecclesiastical Courts on certain grounds, but desertion was not one of them. The Act of 1857 abolished the old ecclesiastical jurisdiction (s. 2) and created a new civil tribunal with new powers, including a power to dissolve marriages altogether; but this power, trenching as it did on the binding sanctity of the marriage tie, and affecting, therefore, not only the parties to the suit, but also their children (if any) and society generally, was limited by the Act, especially by ss. 29, 30, and 31. Although under s. 31 a petitioner who proves adultery by his wife has a right to a decree, unless it is shewn affirmatively

(1) [1906] P. 189.

C. A. 1909

HARRIMAN v. HARRIMAN.

Farwell L.J.

that the husband deserted or separated himself without reasonable excuse, &c.—see *Haswell* v. *Haswell* (1)—yet the Court has to be satisfied by proper evidence of the adultery. No consent or admission can justify a decree; it is the duty of the Court to protect the public by seeing that divorce is obtained only on proper evidence, and so fully is the interest of the public recognized in the matter that by the Act of 1860 (23 & 24 Vict. c. 144), s. 7, any person may intervene between decree nisi and decree absolute to shew cause why the decree should not be made absolute on the ground of collusion or the suppression of facts; and the King's Proctor may intervene at any time during the progress of the cause or before decree absolute. The grounds, and the only grounds, on which a decree for dissolution can be made are set forth in s. 27 of the Act of 1857. It is sufficient to say that a decree for judicial separation is not made available by the Act as one of such grounds. If such a decree is available at all, it is by virtue of the ordinary rules of evidence. I do not doubt that as between the parties the ordinary doctrine of estoppel applies, as was held by the Judge Ordinary in *Finney* v. *Finney* (2); but estoppel is only a rule of evidence, and the duty imposed on the judge by s. 29, which emphasizes by express enactment the necessity for the Court being satisfied as required by s. 31, is not restricted by any such rule. Neither the consent nor the admission of the parties justifies the Court in granting a decree, although such consent or admission is acted on continually in ordinary civil suits, and, by parity of reasoning, no rule of evidence which prevents a party as against the other litigant from giving evidence of the truth can bind the Court to shut its eyes, if it is not satisfied that all the truth is before it. It is plain that the King's Proctor, if he intervenes, can give evidence to shew that the decree for judicial separation (on the hearing of which he had no power to intervene) was improperly obtained, if it forms one of the grounds on which divorce is asked, and that he or any other person intervening between the decree nisi and the decree absolute can do the same; and it would be strange if the Court cannot mero motu declare that it is not satisfied by the former decree, even although it may, as a general rule, think

(1) (1859) 1 Sw. & Tr. 502. (2) L. R. 1 P. & M. 483.

fit to act on it: the Court is at liberty, but is not bound, to accept it.

The present case arises under the Summary Jurisdiction (Married Women) Act, 1895, which enacts that a magistrate's order providing that the applicant be no longer bound to cohabit with her husband shall have the effect in all respects of a decree of judicial separation on the ground of cruelty. The Act of 1857 draws no distinction between such a decree on the ground of cruelty and a decree on any other ground; and it is said that these words must therefore mean that there is an estoppel which prevents the parties or the Court from shewing that there was no cruelty. I will assume, without expressing any opinion, that there is such an estoppel between the parties, but there is certainly none on the Court for the reason that I have just given. If the decree for judicial separation does not prevent the Court from going behind it and inquiring into the facts on which it is founded when it is sought to use it as the ground for divorce, a magistrate's order having the effect of such a decree on one particular ground cannot have any greater effect than the decree itself; and in the present case it would, to my mind, be shocking that the Court should be so bound, because the order shews on the face of it that cruelty was neither alleged nor proved, and the argument must be that s. 29 is repealed to this extent, that the judge is bound to accept a magistrate's order made on evidence of desertion as conclusive evidence of cruelty, although no such evidence was in fact given. Further, the order was, in my opinion, wrong in containing the provision against cohabitation: the section is, perhaps, not very lucid, but it is only reasonable, when an Act specifies various wrongful acts and also specifies three different heads of relief, to construe it as intending to give to the magistrates jurisdiction to grant such of the forms of relief only as may be appropriate to the evidence in each case. Desertion was no ground for a decree a mensa et thoro, but only for restitution of conjugal rights—the logical redress—nor is it a ground for a judicial separation, unless continued for two years; it seems illogical to answer a complaint of desertion for a short period not by an order to cease from, but by an order to continue, the desertion. The basis of the Act of 1884

C. A. 1909

HARRIMAN v. HARRIMAN.

Farwell L.J.

is logical; the order is for restitution of conjugal rights; and it is only disobedience to such an order that is treated as equivalent to two years' desertion—desertion of such length that the Legislature has treated it as equivalent to cruelty as a ground for divorce. The purport of that Act is, as Lord Halsbury says in *Russell* v. *Russell* (1), "simply to provide a new remedy where a decree for restitution had been granted and where the person disobeyed the order." In my opinion Bucknill J. was right in refusing to accept this order as evidence of cruelty; it is apparent on the face of it that the cruelty was not alleged or proved, and in my opinion he would have been free to require evidence of cruelty, even if the order had found cruelty on the face of it, if in the exercise of his duty under s. 29 he thought right to do so. I agree with the judgment in *Judd* v. *Judd* (2) of Bargrave Deane J., with which the President concurred.

The other point taken appears to me hardly arguable. It is said that the husband deserted the wife during the period of two years preceding this suit. But I fail to see how a husband who is prevented by the order obtained by his wife from returning to live with her can be said to have deserted her; the wife who has rejected her husband cannot call herself deserted by him. I entirely agree with Cockburn C.J. in *Ward* v. *Ward* (3), where he says: "Suppose an arrangement had been made, by the advice of the police magistrate, to separate by mutual consent. Though the husband may have left her, yet if there were a corresponding animus on the part of the wife, if she were a party to his leaving and consented to it, that would not constitute desertion. The act of desertion must be done against the will of the wife." In my opinion, therefore, the appeal fails and must be dismissed.

BUCKLEY L.J. read the following judgment:—The Act of 1857, by ss. 16 and 27, entitled the wife to certain relief in case of "desertion without cause," or adultery coupled with "desertion without reasonable excuse," for two years and upwards. The Act of 1884 by s. 5 provided machinery by which under the

(1) [1897] A. C. 395, at p. 426. (2) [1907] P. 241.
(3) (1858) 1 Sw. & Tr. 185.

circumstances there mentioned the wife might obtain relief notwithstanding that the two years had not elapsed. The period of two years remained as established by the Act of 1857, but the Act of 1884 gave a right to relief under circumstances although the two years had not expired. Those circumstances were that the wife had obtained a decree for the restitution of conjugal rights and that the husband had failed to comply with it. The question in the present case may be said to be whether the Act of 1895 has amended or added to the provisions of s. 5 of the Act of 1884. Is it the law that where the husband has been absent from his wife by way of desertion for, say, eight months, and has for a further period of sixteen months and upwards been absent from her in obedience to an order, or after the existence in point of fact of an order, obtained by the wife for non-cohabitation under the Act of 1895, the wife is without more entitled to a divorce on the ground that he has been guilty of desertion without cause or without reasonable excuse for two years and upwards?

There has been argued before us at great length a question of estoppel. In my opinion there is no question of estoppel pertinent to that which we have to decide. What is the fact which the husband is estopped from denying, if he be estopped at all, by the order of the magistrate of March 9, 1906? That was an order whereby, upon a complaint by the wife that her husband did unlawfully desert her, it was adjudged that the complaint was true. The estoppel, if any, is that there had at the date of that order been desertion, but that is not the point to be here proved. The matter for proof is desertion without cause or without reasonable excuse *for two years and upwards*—that is, over a period extending to a date sixteen months later than the order which is relied upon as an estoppel. But, further, it was suggested by an argument which I am incapable of following that the fact which is by estoppel to be taken as true is that there has been cruelty. That contention was based upon this, that the Act of 1895 provides that the non-cohabitation order shall while in force have the effect in all respects of a decree of judicial separation on the ground of cruelty. Those are words which provide that a certain order which has been made shall have the same effect as another order which has not been made.

C. A. 1909

HARRIMAN v. HARRIMAN.

Buckley L.J.

Estoppel of course is as to fact. How that order can establish by way of estoppel the fact that there was cruelty when the complaint was desertion and the fact found was desertion, and the fact of cruelty never was in issue at all, I am unable to understand.

The case then stands thus—that the wife establishes that her husband has been absent by way of desertion for eight months and has remained absent after she had obtained an order that she was no longer bound to cohabit with him. He may have remained absent in obedience to the order or may have remained absent with a continuing intention to desert. It is at least necessary for her to establish that his absence was due to the latter and not to the former cause. I do not at all intend to decide that the existence of a non-cohabitation order precludes the possibility of proving desertion continuing after its date. I think that, notwithstanding a non-cohabitation order, the wife might prove continuing desertion. Desertion is evidenced much more by the intention of the absent husband than by the ready acquiescence of the wife in his absence or even the desire of the wife for his absence. The words of Cockburn C.J. in *Ward* v. *Ward* (1), "The act of desertion must be done against the will of the wife," must be read with their context, namely, "if she were a party to his leaving and consented to it." In that context I agree with them. But if they are to be understood as meaning that desertion cannot be predicated of a husband when his wife is thankful that he has left her (because, say, she always went in bodily fear of him), then, with great respect, I do not agree. Desertion does not necessarily involve that the wife desires her husband to remain with her. She may be thankful that he has gone, but he may nevertheless have deserted her. Further, suppose the wife proved that after the non-cohabitation order she wrote frequently to her husband urging him to return, and saying that if he did so she would receive him and abandon the order, and that he had persistently refused to return. The order is not that the husband shall remain away, but only that the wife is not bound to cohabit with him if he returns. Such considerations as these seem to me to shew that the question

(1) 1 Sw. & Tr. 185.

whether there was a continuing desertion after the non-cohabitation order may well be a question of fact. In the present case the wife has not put forward a case or adduced evidence from this point of view. The absence of the husband after the non-cohabitation order is not ex necessitate rei desertion without cause or without reasonable excuse, which are the words of the Act of 1857, because the existence of the order may have been the cause of or excuse for his absence.

I may add that in my opinion the non-cohabitation clause in the order of March 9, 1906, was relief inconsistent with the complaint made. The wife complained that her husband had left her and obtained an order, not that he should return, but that she should not be bound to cohabit with him. I do not think this order was justified by the facts proved. She might probably obtain that portion of the order to be struck out, and then, after such further lapse of time as to make up the two years, might obtain relief; but so long as that part of the order stands it is, as a subsisting order of a Court of competent jurisdiction, a serious impediment to the wife obtaining relief, because it affirms that until she takes action to the contrary she is a consenting party to her husband's continuing absence.

The learned President in *Dodd* v. *Dodd* (1) pointed out that the powers of the Divorce Court to grant a decree of divorce are limited to certain specific causes which the Act of 1895 does not touch, and said that to uphold the contention there made "would in effect be permitting the Act of 1895 to alter the Act of 1857, though the former is only an Act to amend the law relating to the summary jurisdiction of magistrates in reference to married women, and contains no express provision varying or amending the latter Act, and would, in effect, be giving new grounds upon which a divorce could be obtained by a woman." With these observations I agree. In my opinion *Dodd* v. *Dodd* (2) was rightly decided. The Act of 1895 has not, in my opinion, altered in any way the causes for which the Divorce Court can give relief by way of divorce. I think this appeal must be dismissed.

(1) [1906] P. 189, at p. 201. (2) [1906] P. 189.

C. A. 1909

HARRIMAN v. HARRIMAN.

KENNEDY L.J. read the following judgment:—The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), bestows upon a married woman a method of relief against her husband by procedure in a Court of summary jurisdiction, in particular cases of marital misconduct on his part, which are set forth in s. 4, namely, (1.) certain specified cases of assault, where the husband has been convicted of such assault, (2.) desertion, (3.) persistent cruelty, or (4.) wilful neglect to provide reasonable maintenance for the wife or her infant children, wherever by such persistent cruelty or wilful neglect he has caused her to leave and live separately and apart from him. The form in which, according to the same section, the relief is given is an order to be made by the Court of summary jurisdiction upon proof of the wife's complaint; and s. 5 sets forth four distinct provisions, all or any of which may be included in the order, the Legislature thus entrusting the Court of summary jurisdiction with the exercise of a judicial discretion to fit the order, in regard to these provisions, to the nature and needs of the particular case alleged and proved by the applicant for relief under s. 4. Of the four provisions (*a*), (*b*), (*c*) and (*d*), only (*a*) needs for the purposes of this appeal to be cited at length: "A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty)." Provision (*b*) relates to the custody of children, provision (*c*) to the payment of a weekly allowance by the husband, and (*d*) to the payment of the costs of the application to the Court.

It is to be observed that this Act really consolidates, with amendment, previous legislation contained, so far as regards protection of the wife against the husband's cruelty and violence, in s. 4 of the Matrimonial Causes Act, 1878, and, so far as regards the desertion of the wife by the husband and the wilful refusal or neglect of the husband to maintain his wife or his wife and family, in the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52). The schedule to the Act of 1895 repeals all this previous legislation, the substantive enactments in ss. 4 and 5 of this Act being substituted for the

remedies for the husband's misconduct which the Act of 1878 gave in the case of cruelty and the Act of 1886 gave in the case of desertion and wilful neglect to maintain.

This history, in my view, strongly confirms the interpretation of ss. 4 and 5 of the Act of 1895 to which the language of the text itself and considerations of reasonableness alike point in regard to the proper application of the non-cohabitation order in s. 5 (*a*) which has given rise to the question argued before us in the present appeal. The provision was taken by the draftsman bodily from s. 4 of the Act of 1878, which authorized its use in cases in which a husband had been convicted of an aggravated assault upon his wife, if the Court or the magistrate before whom he was convicted was satisfied that the future safety of the wife was in peril. Its use in an order made under ss. 4 and 5 of the Act of 1895 is permissive; it is not in express terms confined to the cases in which the complaining wife has proved violence or cruelty of the husband as specified in s. 4. Neither, on the other hand, is its use obligatory. And in my judgment the history of this provision, the language of the context, the very nature of the protection which the provision gives, and the enactment in (*a*) that it shall have the effect of a decree of judicial separation on the ground of cruelty unite in shewing that the discretion given by Parliament to the Court of summary jurisdiction as to the framing of orders under ss. 4 and 5 is not rightly exercised, if this non-cohabitation provision is inserted in the order made for the wife's relief, except where the Court has been satisfied by evidence, in the words of the Act of 1878, "that the future safety of the wife is in peril." I do not mean, in saying this, that the non-cohabitation provision ought to be inserted in the order only where the wife has proved the convictions for assault or the persistent cruelty expressly specified in s. 4 of the Act of 1895. It is possible that a wilful neglect to maintain may be proved to have been accompanied by occasional acts of dangerous violence, and so justify the inclusion in the order of the non-cohabitation provision. But I am clearly of opinion that it is neither in accordance with the intention of the Legislature, as appearing in this statute, nor in the interest of the wife or of public morals, that the provision should be included in an

C. A. 1909

HARRIMAN v. HARRIMAN.

Kennedy L.J.

order which is sought for and obtained solely on the ground of the husband's desertion. The present case excellently exemplifies a result which might perhaps on a superficial view appear to be a hardship upon the wife, but which arises in truth from the inappropriate inclusion of the non-cohabitation provision in such a case.

In the present case the material facts are these. In March, 1906, Mrs. Harriman applied under the Act of 1895 to a metropolitan police magistrate for relief against her husband. The one and only ground which she alleged and proved was desertion since July 18, 1905. She was granted an order which contained not only a provision for the payment of weekly maintenance under s. 5 (*c*) and for costs under s. 5 (*d*), but also an order for non-cohabitation under s. 5 (*a*). Inasmuch as the single complaint alleged by Mrs. Harriman or proved before the magistrate was the desertion from July, 1905, to March, 1906, the insertion of provision (*a*) in the order granted to her by the magistrate was not right; but what this Court has to consider on the present appeal is not the correctness of this portion of the magistrate's order, but the effect of it in the event, which has happened here, of legal proceedings for a dissolution of marriage being subsequently instituted by the married woman in the Divorce Division of the High Court of Justice, in which it becomes essential, in order to satisfy the requirements of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), in regard to desertion, that she should be able to prove a continuance of the husband's desertion without reasonable excuse during a period subsequent to the date of the magistrate's order. Mrs. Harriman's petition for divorce was dated December 24, 1907. It alleged against her husband desertion without reasonable excuse from July 18, 1905, and his adultery on two occasions in the course of the year 1907. There was sufficient proof of the adultery of the respondent, and that he had left his wife on July 18, 1905, and had never lived with her since. Mrs. Harriman was therefore entitled to a decree of dissolution of marriage, if the judge of the Divorce Court could properly consider the period of time subsequent to the magistrate's order of March, 1906, as forming part of a space of two years and upwards during which her husband had

deserted her without reasonable excuse, so as to constitute the offence of desertion contemplated by the Matrimonial Causes Act, 1857. Bucknill J., sitting as a judge in divorce, held that he could not so consider it, and therefore, the petitioner declining to amend her petition so as to ask for a judicial separation on the ground of the husband's adultery, he dismissed the petition. He did so, however, solely in deference to the decision of the President of the Probate, Divorce and Admiralty Division in the recent case of *Dodd* v. *Dodd.* (1) The present appeal is, therefore, virtually an appeal from that decision.

In *Dodd* v. *Dodd* (1) Sir Gorell Barnes held that a wife who takes a separation order under the Act of 1895 within two years from the time when the desertion began cannot subsequently, upon the expiration of the two years, allege that her husband has deserted her for the space of two years and upwards without reasonable excuse so as to constitute the offence of desertion contemplated by the Matrimonial Causes Act, 1857.

The counsel for the present appellant has asked us to hold that this was a wrong decision. His argument is put in two ways. In the first place he relies upon a contention which appears to have found favour with Bargrave Deane J. in the undefended case of *Smith* v. *Smith* (2) and with Bucknill J. in the undefended case of *Failes* v. *Failes.* (3) This contention appears, I think, sufficiently for the purpose of comment, in a passage in the judgment of Bargrave Deane J. in *Smith* v. *Smith* (4): "I am forced to conclude that this decision of the justices," i.e., the making of the non-cohabitation order, "is a nullity so far as it affects the jurisdiction of this Court, and was only intended to operate for her," i.e., the wife's, "protection at the time when it was made. I can ignore it." With sincere respect to both the learned judges, I cannot accept this as a correct view. It appears to me that, in truth, the result of adopting it is, whilst, in one sense, ignoring the magisterial order, to ignore, when dealing in the Divorce Court with a pure question of fact, the change in the relative rights and duties of husband and wife which have necessarily followed the magisterial

(1) [1906] P. 189.
(2) [1905] P. 249.
(3) [1906] P. 326.
(4) [1905] P. 249, at p. 252.

C. A. 1909

HARRIMAN v. HARRIMAN.

Kennedy L.J.

order, and thereby in such cases as *Smith* v. *Smith* (1), *Dodd* v. *Dodd* (2), *Failes* v. *Failes* (3), and the present case; in fact, to abrogate, so far as regards the matrimonial offence of desertion on the part of a husband, s. 16 of the Matrimonial Causes Act, 1857, which defines the desertion which is to constitute a ground of a decree of judicial separation as "desertion without cause for two years and upwards," and also s. 27 of the same Act, which authorizes a wife to present a petition for divorce on the ground of the husband's adultery coupled with "desertion without reasonable excuse for two years or upwards." How can a husband be said to be deserting his wife "without cause" or "without reasonable excuse" so long as his wife has obtained an order which is still on foot and which debars him from returning to her? How can he be bound to cohabit, if she is not? Sir Gorell Barnes put these pertinent questions in the course of the argument and in his judgment in *Dodd* v. *Dodd* (2), and but for the opinions of my brethren who decided *Smith* v. *Smith* (1) and *Failes* v. *Failes* (3), I should, I confess, have thought it plain that they could be answered only in one way, and, if they are so answered, that this line of argument cannot successfully be maintained by the appellant.

But this was not the principal argument of the appellant's counsel at the hearing in this Court. He contended further that, inasmuch as the non-cohabitation provision of the magistrate's order has, in the language of s. 5 (*a*), "the effect of a decree of judicial separation on the ground of cruelty," and by virtue of ss. 7, 16, and 27 of the Matrimonial Causes Act, 1857, a wife who satisfies the Divorce Court that her husband has been guilty of adultery coupled with such cruelty as would entitle her to a decree of judicial separation may obtain on these grounds a decree declaring a dissolution of marriage, and a decree of judicial separation on the ground of cruelty is (as he contends) prima facie proof of such cruelty, a wife who, like the petitioner in the present case, can put in evidence the magistrate's separation order and can prove adultery on the part of her husband is entitled to sue him for a divorce and, subject always to the

(1) [1905] P. 249. (2) [1906] P. 189.
(3) [1906] P. 326.

provisions of s. 31 of the Matrimonial Causes Act, 1857, is entitled to the decree for which she has asked.

Sect. 5 (*a*) would, as it appears to me, be a strange piece of legislation if the Court were obliged to give to its language the effect which the appellant has thus invited us to give to it. A wife goes to a Court of summary jurisdiction; she asks for relief, not alleging or proving against her husband cruelty in any form, but desertion only. She obtains an order containing provision (*a*), and thereby, if the appellant's present argument is correct, obtains that which, if the husband afterwards commits adultery, she can use as proof of such cruelty as, coupled with adultery, will justify her petition for a divorce. It seems to me to be impossible to suppose that Parliament in passing the Act of 1895 intended such a result. If it contemplated an alteration in the law of divorce by making a magistrate's order for the relief of a wife who had been deserted by her husband for a less period than two years equivalent in her proceedings for a divorce to a decree of separation on the ground of desertion, it surely would have said so, either in explicit terms or by adding some such words to s. 5 (*a*), after the words "on the ground of cruelty," as "or on the ground of desertion as the case may be." But, as the President of the Probate, Divorce and Admiralty Division has pointed out, the words "shall have the effect in all respects of a decree of judicial separation on the ground of cruelty" have a natural and sufficient meaning and effect given to them if they are interpreted as conferring upon the wife the benefit of ss. 25 and 26 of the Act of 1857. I agree with him that the argument of the appellant which I am now considering, and which he had to consider in *Dodd* v. *Dodd* (1), though ingenious, is entirely unsound, and I desire to adopt, and therefore I need not restate here, the clear and cogent reasoning expressed in his judgment in support of this conclusion.

I desire briefly to make two further remarks. A good deal was said in the course of the argument on this appeal as to the effect, as a matter of evidence in divorce proceedings, of a prior decree of judicial separation. The case (very briefly reported) of *Bland* v. *Bland* (2) was especially referred to in this connection.

(1) [1906] P. 189. (2) L. R. 1 P. & M. 237.

C. A. 1909

HARRIMAN v. HARRIMAN.

Kennedy L.J.

As at present advised, I am of opinion, having regard to the peculiar functions and responsibilities of the Divorce Court and the provisions of ss. 29, 30, and 31 of the Act of 1857, that a decree of judicial separation ought not in subsequent proceedings for divorce to be treated in regard to the matters upon which the decree is based as constituting either conclusive proof by way of estoppel, or even as constituting prima facie proof, in the sense of being evidence upon which, in the absence of proof to the contrary by the adverse party, the Court would be bound to act.

The one other remark which I desire to make is this. The learned counsel for the appellant pressed upon us the consideration of a suggested hardship upon the wife unless the period of desertion required by statute to constitute the desertion a matrimonial offence was held to continue to run after the date of the magistrate's separation order. The same argument, according to the reports, appears to have been used by counsel for the wife in *Smith* v. *Smith* (1) and to have weighed with the learned judge who decided *Failes* v. *Failes* (2); for the latter says (3) that " to hold the contrary would mean this—that the fact that a man's wife had proceeded against him for an order by the magistrate to maintain her whom he had deserted would destroy the wife's right to proceed against him for a decree nisi afterwards, and would enable him with impunity to commit adultery with any person or persons as against his wife, and that her hands are to be held tied because of the order of the magistrate." It appears to be desirable, on public grounds, not to leave a statement of this nature uncorrected, if it is founded, as I believe it to be, upon a misconception. The married woman in that case, as Mrs. Harriman has done in the present case, had created the difficulty for herself. Proceeding in the Court of summary jurisdiction for maintenance, as the learned judge says, because her husband had deserted her, she might, if she pleased, have obtained an order giving her the maintenance and not containing provision (*a*), the non-cohabitation provision. Without the inclusion of that provision the order would not have operated to

(1) [1905] P. 249. (2) [1906] P. 326.

(3) [1906] P. 326, at p. 329.

stop the running of the statutory period of desertion, which had begun already. There is no necessity in such a case for the insertion of that provision, as the President was careful to point out in *Dodd* v. *Dodd* (1); and in my view, and I think in his view also, it is appropriate only in cases in which the evidence shews the Court of summary jurisdiction that the wife's safety is in jeopardy. If, on the other hand, the husband has been guilty of cruelty, and therefore this non-cohabitation provision is properly included in the order, the wife, if the husband commits adultery, can rely upon that cruelty coupled with the adultery in proceedings instituted to obtain a divorce.

In my opinion this appeal should be dismissed.

Appeal dismissed.

Solicitor for petitioner: *H. A. Brady.*

Solicitor for the King's Proctor: *Solicitor to the Treasury.*

W. J. B.

GILL *v.* GILL.

1909

March 10, 12.

Probate—Practice—Lunatic Defendant — Position of Official Solicitor, if appointed Guardian ad litem — Will torn up in Testator's Presence without his Authority—Subsequent Ratification inadmissible—Words missing from Will when pieced together—Oral Evidence—Probate—Form of Order.

The official solicitor, if appointed guardian ad litem to a lunatic defendant in a probate suit, has no greater rights and is in no better position than any other solicitor appearing for a party in a probate suit, except that he will probably be allowed, out of the estate, costs properly incurred in the conduct of the defence.

Where a will has been torn up without the testator's authority, he cannot, by any subsequent ratification of the destruction, render the act a valid revocation of the will.

The dictum of Butt J. in *Mills* v. *Milward*, (1889) 15 P. D. 20, approved.

The Court will not order to be inserted in the probate words actually missing from a torn will which has been pieced together, but the practice to be followed in such a case, where satisfactory oral evidence is before the Court proving what the missing words were, is to allow a document shewing what those words are proved to have been to be annexed to the probate.

THIS was a probate suit in which a torn will was propounded. The plaintiffs, Ethel Gill and Alfred Ogden, as executors,

(1) [1906] P. 189, at p. 202.

1909

GILL v. GILL.

propounded the will of John Hinchliffe Gill, late of Heath Lodge, Hebden Bridge, in the county of York, dyer and finisher, who died on July 7, 1908, the said will bearing date December 22, 1902.

The defendants were four sisters and a brother, next of kin of the testator. The sisters did not appear; but the brother, who was of unsound mind, was represented by the official solicitor as his guardian ad litem, and he pleaded that the will was not duly executed, and that it was revoked by having been torn up by the deceased or by the plaintiff Ethel Gill in his presence and by his direction, with the intention of revoking the same.

The writ was issued on September 23, 1908; the appointment of the official solicitor as guardian ad litem of the male defendant was made in October, 1908; a copy of the case, submitted to counsel for the plaintiffs before the suit was commenced, was furnished to the official solicitor on November 21, 1908; the defence was delivered on December 5, 1908; and the action was, on December 18, 1908, set down for hearing before the Court itself.

A correspondence, commencing on February 16, 1909, and ending on March 9, 1909, passed between the official solicitor and the London agents for the plaintiffs' solicitors, in which the former insisted upon being afforded facilities to interview the plaintiffs' witnesses.

The names of the witnesses and the main points of the evidence which they would be able to give were contained in the case, a copy of which was furnished to the official solicitor, as aforesaid, in November; and copies of the actual proofs, which the plaintiffs' solicitors took subsequently, were furnished to the official solicitor on March 6, 1909. His demand to be given facilities to see the witnesses being resisted,

Priestley, K.C. (*W. O. Willis* with him), applied to the Court to postpone the hearing, upon an affidavit of Mr. William Howard Winterbotham, the official solicitor, which, inter alia, exhibited copies of the correspondence which had passed, and stated that "as appears from this correspondence Messrs. Ridsdale & Son refuse to consent to my seeing the witnesses referred

to and taking their proofs, on the ground that, having been supplied with the proofs they have themselves taken, I am not entitled to anything further. As a matter of fact, I was in the first instance only supplied with a proof of the plaintiff Ethel Gill, and it was not until the 6th inst. that other proofs were sent to me. I have not, however, read those further proofs, because I prefer to take statements from the witnesses myself, and not to accept statements obtained by the solicitor acting for the other side. . . . . I submit that . . . . facilities should be afforded to me by the plaintiffs' solicitors to interview the persons I desire to see, or, in the alternative, that the order appointing me guardian ad litem of the lunatic defendant should be discharged, so as to relieve me from further responsibility in the case."

Tindal Atkinson, K.C. (*Durley Grazebrook* with him), for the plaintiffs, opposed the application. The plaintiffs' London agents have gone out of their way to furnish information which it was not incumbent upon them to supply to the official solicitor, but they strenuously oppose his present application and submit that it is unwarranted. The official solicitor is in no better position than any other solicitor appearing for an ordinary party in a probate action, unless it be in regard to his costs.

BARGRAVE DEANE J. This application raises a question of considerable importance, because it is alleged by those who make it that the official solicitor is in a different position to an ordinary party in a probate action. There is no precedent for any such position. The official solicitor stands in no better position than any other party in a probate action. His contention is that he is entitled to call upon the solicitors on the other side to afford him facilities to interview and cross-examine their witnesses before the hearing. Whether a solicitor is entitled to go and interview a witness who he knows has given a statement to the other side is a point as to which some differences of opinion exist; but, except in the case of the attesting witnesses to a testamentary document, who are the witnesses, not of any one party, but of the Court, and medical witnesses, who may also, possibly, be looked upon in that light, a solicitor is certainly not

1909

GILL v. GILL.

Bargrave Deane J.

entitled to call upon the solicitors on the other side to afford him facilities for interviewing witnesses. Mr. Winterbotham is in no better position than any other solicitor who is acting for a party in a probate action, except, perhaps, in regard to costs.

It has, however, been the practice for a long time for the official solicitor to apply for information to the solicitors on the other side who have made him a party to the suit; and I know from experience that very often the solicitors have supplied information and have furnished proofs of witnesses. But I am not aware that the official solicitor has any right to demand facilities or information further than any other solicitor who is acting for a party in a probate action; and if the other side decline to supply him with proofs or to afford him other facilities, I am afraid he must be left to make inquiries and obtain information himself, in which case he might, perhaps, have ground for asking for the costs of prosecuting those inquiries. I cannot see, therefore, that I can help the official solicitor at all in the present case or accede to his application. It is said by counsel on his behalf that he cannot be ready by to-morrow. I am told, on the other hand, that the plaintiffs' witnesses are, or may be, already on their way up from Yorkshire. It will be open to me to adjourn the hearing at any stage if I see any necessity for doing so; but I cannot at present put the plaintiffs to the expense of coming up for nothing, and I must refuse this application. The case will take its place in the paper to-morrow.

March 12. On the hearing of the case, Mrs. Gill, the testator's widow, was called and deposed as to the destruction of the will by herself in a fit of temper and after her husband, when drunk, had made some irritating remark to her. A lady who was staying in the house at the time spoke as to what took place on the following day, when the testator told his wife to fetch the will and shew the witness what she (the wife) had done to it in her temper. Another witness deposed to a conversation within a few months before the testator's death, when the testator told this witness that he had left all he had to his wife, but had by

his will made provision that his sisters were to take the property in case his wife should predecease him.

The surviving witness to the will having proved that it was duly executed and that the other attesting witness, in whose handwriting the will was, was dead, the learned judge intimated that, in the absence of any evidence on the other side, he was fully satisfied and desired no further witnesses to be called by the plaintiffs.

Priestley, K.C., for the official solicitor, representing the lunatic defendant, addressed the Court and referred to *Mills* v. *Milward*. (1)

BARGRAVE DEANE J. I have no hesitation at all about this case. The Wills Act says that a will may be revoked in certain specified ways, one of which is by tearing, and it says that the tearing must be performed by the testator himself, or by his direction and in his presence—that is to say, the act must distinctly be done by the testator's authority.

In this particular case the will was torn up in the presence of the testator by his wife. Was it done by his authority? There is not a particle of evidence to suggest that he authorized it. The wife says that he did not, and on that I accept her evidence that she did it in a fit of temper. It was about as silly a thing to do as could possibly be imagined; but she was at the time beside herself with anger, just as he was beside himself with drink. I doubt whether he had capacity at the time to give any authority, and I do not think that she was sufficiently self-possessed to appreciate what she was doing. Under these circumstances it is impossible to hold that the act of destruction was performed with the authority of the testator. If it was not done with his authority at that time, the dictum of Butt J. in *Mills* v. *Milward* (1) indicates what in my opinion is good law, namely, that no amount of authority afterwards can be brought into play so as to ratify an act done without authority at the time. If a testator under such circumstances desired that the act of destruction, performed without his authority at the time,

(1) 15 P. D. 20.

1909

GILL v. GILL.

Bargrave Deane J.

should prevail, he had it in his power effectually to revoke his will in accordance with the provisions of the Wills Act. He could either execute a document expressly revoking his will, or he could make a fresh will dealing with his property in any way he chose. In the present instance, so far from doing anything of the sort, the testator always treated the act of destruction by his wife rather as a joke and as of no effect in law—and he was right. He told people what she had done in her temper, and he laughed at it; he spoke, within a few months of his death, of having left everything to his wife if she survived him. I am satisfied that this will was never revoked, and accordingly I admit it to probate.

I am asked to allow three or four words which are missing from the left-hand top corner of the document to be included in the probate. Oral evidence was given as to them. It is quite obvious, from the context, what words the missing piece of paper must have contained; and Mr. Grazebrook has referred to the case of *Sugden* v. *Lord St. Leonards* (1) in support of the proposition that oral evidence may be received and accepted of the contents of a missing document. But I remember a case in which words were, or a certain word was, read into a will by one of the judges of this Court, and when the late Lord Hannen, who was at the time President of this Division, heard of it, he expressed strong disapproval. I will, however, allow a paper to be annexed to this will shewing what were the missing words, as proved before me by the oral evidence of Mrs. Gill, one of the plaintiffs. There is authority for adopting such a course. It will meet the wishes of the plaintiffs and their advisers. It differs only in form from the application they made to me. The rules of practice I have referred to seem to contain a distinction without a difference.

Priestley, K.C., asked for an order for the official solicitor's costs similar to that granted by Neville J. in *Goatly* v. *Jones* (2), and he also referred to the Rules of the Supreme Court, Order LXV., r. 13, and to *Eady* v. *Elsdon.* (3)

Tindal Atkinson, K.C. The order should not include the costs

(1) (1876) 1 P. D. 154. (2) [1907] W. N. 161.
(3) [1901] 2 K. B. 460.

of the misconceived and abortive application to postpone the hearing.

1909

GILL v. GILL.

BARGRAVE DEANE J. I cannot say that the official solicitor, although entirely wrong in his view, was not acting bona fide in making that application. My view is that the official solicitor is entitled to have, out of the estate, such costs as have been reasonably incurred in these proceedings.

Solicitors for plaintiffs: *Ridsdale & Son, agents for Sutcliffes, Hebden Bridge.*

Solicitor for lunatic defendant: *The Official Solicitor.*

H. D. G.

THE BOUCAU.

1909

Jan. 27, 28.

Admiralty—Ship—Damage to Jetty—Negligence — Onus of Proof — Force majeure.

The plaintiffs, the harbour authority of Workington, sued the defendants, the owners of a steamship, for damage to their jetty situate at the junction of, and between, the river Derwent and the harbour. The defence in substance was that the plaintiffs invited the defendants' vessel, which was in charge of a compulsory pilot, to enter the harbour at a time when there was one foot less water than shewn by the tide table, so that, when approaching the entrance, with only two feet of water under her, the head of the vessel was canted to port towards the jetty by a freshet, on her port quarter, of two knots running down the river, whilst a strong breeze was acting on her starboard side, with the result that, though the pilot ordered the engines to be put full speed astern and the order was obeyed, with hand reversing gear, in twenty-two seconds, the way was not taken off in time to prevent the stem of the vessel striking the jetty:—

Held, that the defendants were not liable, as they had discharged the onus of proof by rebutting the prima facie case of negligence against them, for the damage complained of arose from a combination of circumstances consisting of less water than usual, a strong breeze, and a freshet, which together amounted to force majeure.

ACTION FOR DAMAGE to jetty.

The plaintiffs were the Workington Harbour and Dock Board. The defendants were the owners of the *Boucau*.

1909

THE BOUCAU.

On May 17, 1908, about 11.30 A.M., the weather being fine, with a strong south-westerly breeze, the French steamship *Boucau*, belonging to the port of La Rochelle, of 1150 tons gross register, 216 feet long, and 28 feet beam, with compound engines of 175 horse power nominal working up to 700 indicated, from Castro to Workington with a cargo of iron ore, and drawing 15 feet 4 inches, was making for the entrance to the harbour of Workington, about 140 feet in width, in charge of a duly licensed pilot, when, according to the plaintiffs, she negligently struck stem on and damaged the seaward end of the wooden jetty forming the prolongation of the merchants' quay at the junction of the harbour with the river Derwent. High tide that morning was at 11.58, and, according to the tide table, there should have been 18 feet 9 inches, but the actual rise was only 17 feet 8 inches, and a current was running down the river at the rate of about two to three knots.

By the third and fourth paragraphs of their defence the owners of the *Boucau* alleged that "as the vessel was being navigated to pass between the merchants' quay jetty and the quay on the opposite side of the harbour entrance she was canted to port towards the jetty by the current on her port quarter and the wind on her starboard side. Under the orders of the pilot the engines of the *Boucau* were at once put full speed astern, but before the way could be taken off the *Boucau* her stem caught the end of the jetty"; and whilst denying the allegation that the *Boucau* negligently ran into the jetty, the defendants, by the fifth paragraph of their defence, in the alternative, said that "if the collision between the *Boucau* and the jetty was caused by any negligence in the navigation of the *Boucau* it was solely negligence of the duly licensed pilot acting in charge of the *Boucau* within a district in which the employment of such pilot was by law compulsory on the defendants."

By their reply the plaintiffs submitted that paragraphs 3 and 4 of the defence disclosed no answer in law to the claim, and they further alleged that "if the pilot was negligent (which is not admitted) the collision was caused or contributed to by the negligence of the defendants' servants in that the order to put the engines full speed astern was not obeyed with due promptitude

or the engines were incapable of being reversed with reasonable quickness and that no anchor was let go by the crew or that the ground tackle was not capable of being let go with reasonable quickness or was not in readiness to be let go: and that the *Boucau* was a bad steerer: and that the master of the *Boucau* gave the pilot no assistance or advice or warning as to the said or any characteristics of the *Boucau* or her engines or ground tackle."

The vessel had steam steering gear, but hand reversing gear, and experiments shewed that it took twenty-two seconds to get the engines going from stop, at which the engines, at the material time, were standing, to full speed astern.

In a letter addressed to the owners of the *Boucau* by her master, on the same day as the accident, the description given was that the vessel with the tide failed to steer, and, as the engines did not start astern immediately, the vessel struck against a wooden wharf.

1909. Jan. 27, 28. *Aspinall, K.C.*, and *Leslie Scott*, for the plaintiffs, the Workington Harbour and Dock Board.

Laing, K.C., and *Stubbs*, for the defendants, the owners of the *Boucau*.

The arguments of counsel fully appear from the judgment. In addition to *The Indus* (1) (referred to in the judgment), in which Lord Esher sums up the effect of *Clyde Navigation Co.* v. *Barclay* (2), the cases of *Clyde Shipping Co., Ld.* v. *Miller* (3) and *The Woodford* (4) were cited by counsel for the plaintiffs. For the defendants the cases of *The Annot Lyle* (5) and *Mann, Macneal & Co.* v. *Ellerman Lines* (6) were referred to, and Marsden on Collisions at Sea, 5th ed. (1904) p. 224.

BARGRAVE DEANE J. This is an action brought by the Workington Harbour and Dock Board against the French steamship *Boucau* for damage done by the *Boucau* to a wooden jetty near the entrance to the harbour of Workington.

(1) (1886) 12 P. D. 46, at p. 49.
(2) (1876) 1 App. Cas. 790.
(3) (1907) 9 F. 1145.
(4) For judgment of the Court of Appeal (March 11, 1905), see *Ship. Gaz.*, March 13, 1905. The decision was affirmed by the House of Lords, March 9, 1906.
(5) (1886) 11 P. D. 114.
(6) (1904) 7 F. 213.

1909

THE BOUCAU.

Bargrave Deane J.

The case raises some curious points. First of all there is the question of onus of proof. Undoubtedly this French steamer ran into the jetty and damaged it, and the jetty being a stationary object, incapable of getting out of the way or doing anything at all, the steamer is, prima facie, liable for running into it. She pleads, however, that it was no fault of hers—that she was under compulsory pilotage. The other side say, "Whether you were under compulsory pilotage or not you are liable. First of all we say that the pilot was not guilty of any negligence himself, and, therefore, your compulsory pilotage plea fails; secondly, we say that in any event we will shew you were guilty of negligence; and we shew it in this way, that the conduct of your crew was such that, although an order was given to execute a certain manœuvre, they were not prepared to do so, and did not at once obey the order, and that was the real cause of this collision."

Now it seems to me that the law as to this state of things is fairly clear. Prima facie the defendants are liable. The defendants, however, say, "We were under compulsory pilotage, and if there was any negligence in the conduct of our ship it was done under the orders of the pilot, all of whose orders were obeyed, and we are not responsible." Thereupon the harbour board call the pilot, who says he did everything necessary, and that the real cause of the accident was that, although he gave an order to put the engines full speed astern, there was delay in obeying his order. Therefore he not only protects himself, but hits as hard as he can at the defendants; and I think, having put forward the plea of compulsory pilotage, the defendants, by law, have cast upon them the onus to discharge themselves of the responsibility.

Now I think there is only one charge preferred by the plaintiffs against the defendants, and that is as to the carrying out of the order to the engines. What is the truth about that? We have a most unsatisfactory state of things. I do not want to say anything which will hurt anybody's feelings, but it is extremely odd to find that the harbour-master makes a report at once, and says, "I saw the whole thing and no blame attaches to any one." The pilot also makes a statement at once, and he says, "All my orders were promptly carried out, and I have no fault to find

1909

THE BOUCAU.

Bargrave Deane J.

with the ship or any one on board." Those are statements made at the time by the pilot and the harbour-master. Now by the side of the harbour-master was standing the deputy harbour-master, and also Captain Spicer, of the ship *Lancashire*, which was in the harbour. Those two gentlemen made no statements at the time about it. The deputy harbour-master was first spoken to about this matter, he says, two months ago, which I notice was just about the date of the writ. Captain Spicer was spoken to about two weeks ago, which I find is just the date of the reply. Now we find that the harbour-master and the pilot have turned right round, and say, "Not only do we impute blame to you, but we say the orders were not properly carried out." I think it is a very unsatisfactory state of things. It looks very much as if the harbour people had persuaded some of these witnesses to eat their own words at a later date. That, however, does not conclude the whole case, because unless the defendants satisfy me that there was no fault on their part, then I am bound in fact to find that the onus is not discharged. Now what happened? I find these facts. I find that on that particular day the pilot boarded this ship out in the roadstead somewhere about half-past 10. He was on board outside the harbour for somewhere about an hour, waiting for the flag to be hoisted to shew that the vessel could come in. The pilot says the vessel is known in the harbour and that they knew her draught. The pilot says that when the flag was hoisted it was an indication that there was water for her to come in. The pilot says he had no opportunity, coming in as he did, to see whether the water was at its proper height, but we have it now stated as a fact that instead of there being 18 feet 9 inches of water in the harbour there was only 17 feet 8 inches; and this vessel was drawing 15 feet 4 inches. Therefore there was only a little over two feet of water under her, and, so far as I can judge, that fact was not known at the time to anybody, and it looks very much as if those in the harbour had not taken sufficient notice of the actual height of the water, but were going by the tide table. However, that does not affect my judgment, because I am not going to find the harbour authorities liable or responsible for that default. I am not sure that there was default, but we do know that there was less

1909

THE BOUCAU.

Bargrave Deane J.

depth of water than the tide table shewed. What happened? The vessel came in by the invitation of the harbour authority. We are told that there was a freshet in the river, and, although it was not quite high water, there was a current against the vessel coming up of two knots, and the vessel was going at about three knots through the water. She came up close to this point where she had to go round under port helm to enter the harbour. There was a strong wind from the west, put at force 5, and we are told by the pilot that the vessel had come up at full speed because of the state of the weather. Before she got to the place where she had to turn she had to stop her engines, and she was going about a knot. When she turned round she would get the full force of the current on her port quarter and the full effect of the wind on her starboard bow, and the result was that, instead of continuing her course to starboard, disregarding her port helm and disregarding the fact that she had a right-handed screw, in the captain's words, she made a sheer bodily to port. This vessel had got her bows about in a line between the two ends of the harbour. The evidence is that she had the jetty, she ran into, on her port bow, and that then she sheered with her bow towards it; and I think that the swing of the vessel with her sheer and the pressure of the current against her port quarter would very likely give her a tendency to go forward as well as make this spin round to port. The pilot says, "Upon seeing that, I at once gave an order to go full speed astern," and his evidence is that for the purpose of enforcing that order, and to shew it was urgent, he repeated it immediately. He says that as far as he was concerned that order was given as promptly as possible. It turns out that this vessel is of such a construction, although she is of normal type, that she is equipped with old-fashioned engines, which are not capable of being reversed very quickly. Instead of being reversed very quickly, it takes twenty to twenty-five seconds to do so. That is a defect, but it is not a defect of which the Court will take notice, because it is in evidence that she is of normal type and it is in evidence that it was known in that part of the world what type of vessel she was. They knew all there was to be known about her, and the pilot, as I have pointed out, did not make any complaint about her at the time. The anchor

1909

THE BOUCAU.

Bargrave Deane J.

was not let go; but there would have been no use in letting it go, for, with the little water under her, the vessel would have run over it.

Why was it that the vessel took this sheer? In my opinion, and in the opinion of the Elder Brethren, who are more competent than I am to form an opinion, it was due to the cause, primarily, that there was less water in the river than was supposed, and instead of this vessel having three feet under her she had only two. The result was that at the time when she presented a very much larger surface to the current she had less water under her, and there was an extremely strong wind from the west blowing, as I have said, on her starboard bow. In my opinion that extreme cant, which is described by the pilot himself as an extraordinary one, was the real cause of this trouble. It seems to me that the defence to this case is this: "You have accused me of not obeying orders promptly. I discharge that attack by means of your own witnesses, who say that I did obey the orders promptly and that nobody is to blame. Out of the mouths of your own witnesses I take my defence"

Now if they have in that sense discharged the onus which the law imposes upon them, then the defendants have absolved themselves from blame; but I go one step further, and I apply the reasoning of the late Lord Esher in *The Indus* (1), that the defendants "could say that everything was done which could be done by careful seamen, but that some overwhelming storm occurred which prevented the ship from being navigated as she ought to have been." I think this was a case of force majeure, and that the whole cause of the disaster had nothing to do with the ship itself, but was due to the extraordinary conditions which prevailed at the particular moment at that particular spot.

My judgment is that this is a case of vis major, and that the defendants are not liable for the damage, first, because they have not been guilty of any negligence, and, secondly, because I think that it was brought about by the conditions of the tide, of the current, and of the wind on that particular day in that

(1) 12 P. D. 46, at p. 47.

1909

THE BOUCAU.

particular part of the harbour at Workington. Therefore there will be judgment for the defendants.

Solicitors for plaintiffs, the Workington Harbour and Dock Board: *Ledgard & Smith, for Milburn, Son & Sewell, Workington.*

Solicitors for defendants, the owners of the *Boucau*: *Stokes & Stokes.*

T. L. M.

1909

March 1.

THE BUTESHIRE.

Admiralty—Salvage—Practice—Pleading—Admission of Facts—Non-admission of Inferences—Exclusion of Further Evidence—Value of Salved Property.

To recover remuneration for services rendered to a stranded steamship, seven actions of salvage were commenced on behalf of eight tugs and the crews of two lifeboats. These actions were consolidated and one defence was put in, the material paragraph of which stated that "the defendants admit the facts alleged in the various statements of claim . . . . but not the inferences sought to be drawn from the said facts, and they submit themselves to the judgment of the Court thereon."

At the trial leave was asked on behalf of some of the salvors to put in the log of the defendants' vessel, and, on behalf of other salvors, to amend their statement of claim, on the ground, in both cases, that discovery of the defendants' documents, obtained after the defence had been delivered, particularly the letters and telegrams of the defendants' master, had disclosed material facts tending to lead to inferences increasing the value of the services rendered by these plaintiffs:—

Held, that both applications must be refused, the first on the ground that further evidence at the trial as to the salvage services was inadmissible, the Court being only concerned with the inferences to be drawn from the admitted facts, and the second on the additional ground that the application came too late, as it should have been made before the trial, after discovery had been obtained.

After the delivery of the statements of claim, and after the date of the affidavit of value filed by the defendants, it was ordered that "each side be at liberty to call evidence as to value." At the trial the values of the plaintiffs' vessels were agreed, but objection was taken to the defendants' affidavit giving the value of the stranded vessel at 28,000*l.*, her cargo 58,817*l.*, and freight at risk nil—total 86,817*l.* On the balance of testimony the Court fixed the value of the ship at 40,000*l.*, and of the

cargo at 75,000*l.*, bringing the total up to 115,000*l.*, and, on this enhanced value, made separate awards to the various salvors, amounting in the aggregate to 7275*l.*

CONSOLIDATED ACTIONS OF SALVAGE.

The plaintiffs were the owners, masters, and crews of the tugs *Victor*, *Champion*, *Lady Crundall*, *Lady Curzon*, *Arcadia*, *Florida*, *Premier*, and *Aid*, and the coxswains and crews of the Margate and Ramsgate lifeboats.

The defendants were the Elderslie Steamship Company, Limited, of Glasgow, owners of the steamship *Buteshire*, and the owners of her cargo and freight.

The *Buteshire*, a steel screw steamship of 5583 tons gross register, with engines of 600 horse power nominal, and refrigerating machinery, was on a voyage from Buenos Aires to London via Liverpool, with a cargo of frozen meat, hides, &c., when on the early morning of December 27, 1908, she went ashore on the Long Sand at the entrance to the Thames, and remained fast, the weather at the time being thick with snow, the wind strong and squally from the eastward, and the sea heavy. Rockets were fired from the Tongue and Edinburgh lightships, in response to which the Margate lifeboat *Eliza Harriet*, carrying a crew of fifteen hands, went out to the vessel and, arriving about 9 A.M., when it was about low water, was asked to stand by. About noon the *Lady Curzon*, a twin screw tug of Dover, of 253 tons gross register, engines of 1000 horse power indicated, and a crew of eight hands, reached the stranded vessel, made fast, and commenced to tow, but without effect. The *Victor*, a screw tug of 133 tons gross register, engines of 650 horse power effective, and a crew of seven hands, shortly afterwards came up, and was followed by the *Champion*, a screw tug of 116 tons gross register, engines of 650 horse power effective, and a crew of seven hands. These three tugs towed for some time, and about 3 P.M. the *Aid*, a double-headed steel paddle tug of 193 tons gross register, engines of 750 horse power indicated, and a crew of eight hands, came up, bringing with her the Ramsgate lifeboat *Charles and Suzanna Stephens*, carrying a crew of twelve hands. Towage was suspended for a time owing to the tide being ebb, but on the flood making sufficiently the

1909

THE BUTESHIRE.

four tugs towed at the vessel, but failed, though assisted by the vessel's own engines, to do more than drag her a short distance astern, and the *Lady Curzon* then took the chief officer of the *Buteshire* to Margate, in order to communicate with the owners of that vessel. About 5 P.M. the *Premier*, a screw tug of 83 tons gross register, engines of 340 horse power effective, and a crew of seven hands, which had been waiting at Gravesend for the arrival of the *Buteshire*, came up, bringing with her the assistant marine superintendent of the Elderslie Line, and about midnight the *Florida*, a screw tug of 114 tons gross register, engines of 700 horse power effective, and a crew of seven hands, arrived, and subsequently made fast ahead of the *Lady Crundall*, a twin screw tug of Dover, of 366 tons gross register, engines of 1600 horse power indicated, and a crew of nine hands, which arrived about 2.30 A.M. on December 28, having been preceded by the *Arcadia*, a screw tug of 179 tons gross register, engines of 750 horse power effective, and a crew of nine hands. On the early morning tide of December 28 another united attempt was made to tow the vessel off; but it was not until 4.30 P.M., when a third and successful effort was made, that the *Buteshire* came off. She then cast off the tugs and proceeded under her own steam to her destination; but during the towage the *Victor* and the *Lady Curzon* came into collision, and the *Lady Curzon* also fouled the *Lady Crundall*, the damage done to the *Victor* being estimated at 120*l.* 12*s.* 6*d.*, to the *Lady Curzon* 60*l.*, and to the *Lady Crundall* 70*l.* The *Arcadia* was also damaged as the result of a collision with one of the other tugs to the extent of 28*l.*

By their statement of claim the owners, masters, and crews of the tugs *Victor* and *Champion* alleged that they assisted in saving the *Buteshire* from probable total loss; that she was ashore on a very dangerous sand, and without the help of powerful tugs would never have come off; that the services were attended with great risk, and, owing to the state of the weather, the crews were exposed to much hardship and fatigue. Similar allegations were made in the pleadings of the other tugs, and on behalf of the Ramsgate lifeboat it was alleged that the second coxswain and seven of the crew were engaged on board the *Buteshire* in helping to handle and make fast the tow ropes, whilst those who remained

in the boat were exposed to some risk and great hardship owing to the severity of the weather. Similar statements were made on behalf of the Margate lifeboat in respect of exposure to the weather prevailing at the time, and a claim was set up of 12*l.* 19*s.* 3*d.* for damage done to the boat for which the crew were liable.

By an order dated January 27, 1909, the solicitors for the plaintiffs the owners, masters, and crews of the tugs *Victor* and *Champion* were to have the conduct of the consolidated action, and by an order dated February 8 each side was to be at liberty to call evidence as to value, and the defendants were within five days to deliver their defence, and within three days thereafter to file an affidavit as to documents.

The values of the tugs, as given in their respective statements of claims, were accepted, namely, *Victor* and *Champion*, 7500*l.* each; *Lady Curzon*, 13,000*l.*; *Lady Crundall*, 20,000*l.*; *Arcadia*, 6500*l.*; *Florida*, 7000*l.*; *Premier*, 4000*l.*; *Aid*, 13,000*l.*

The affidavit of value filed by the defendants put the value of the *Buteshire*, in her damaged condition, at 28,000*l.*, and that of her cargo at 58,817*l.*, her freight at risk being nil—total 86,817*l.*; but, on the evidence, the Court increased these values, in the way set out in the judgment, to 40,000*l.* and 75,000*l.* respectively, making a total of 115,000*l.*

By their defence the defendants admitted "the facts alleged in the various statements of claim . . . . but not the inferences sought to be drawn from the said facts," and they submitted "themselves to the judgment of the Court thereon."

Lauriston Batten, K.C., and *Dawson Miller*, for the tugs *Victor* and *Champion*.

Aspinall, K.C., and *Hugh C. S. Dumas*, for the tugs *Lady Curzon* and *Lady Crundall*.

C. Robertson Dunlop, for the tug *Arcadia*.

A. Bucknill, for the tug *Florida*.

Baden Powell, K.C., and *R. H. Balloch*, for the tug *Premier*.

C. Stubbs, for the tug *Aid* and for the crew of the Ramsgate lifeboat.

A. E. Nelson, for the crew of the Margate lifeboat.

1909

THE BUTESHIRE.

Laing, K.C., and *D. C. Leck*, for the defendants, the owners of the *Buteshire*, her cargo and freight.

Counsel for the plaintiffs, the tugs *Victor* and *Champion*, asked leave to put in the log of the *Buteshire*, but, on objection taken by counsel for the defendants, the Court refused the application on the ground that, the defendants having admitted the facts as pleaded, it was contrary to the practice to allow further evidence to be given in respect of the salvage operations, the only question for the Court being the inference to be drawn from the admitted facts. Thereupon, counsel for the plaintiffs, the owners, master, and crew of the tug *Premier*, asked leave to amend their statement of claim on the ground that discovery of the defendants' documents, particularly the letters and telegrams of the master of the *Buteshire*, had disclosed material facts tending to lead to inferences increasing the value of the services rendered by these plaintiffs; but, on objection taken by counsel for the defendants, the Court refused this application also, on the additional ground that it came too late, as, if there was any substance in the application so that it could have been made at all, it should have been made before the trial.

BARGRAVE DEANE J. In this case the steamship *Buteshire*, a vessel of 5583 tons gross and 3619 tons net register, on a voyage from Buenos Aires to London with a cargo of frozen meat, got on to the Long Sand in the early morning of December 27 last, and she was got off on the 28th. She was in a very awkward position, and it was no doubt advisable that she should be got off as quickly as possible. The weather was extremely bad. It is said to have been blowing a gale from the east, with squalls and snow and a heavy sea, and undoubtedly she was well on this sand.

The first vessel to come up to her seems to have been the Margate lifeboat. Next came the *Lady Curzon*, followed by the *Victor*, and shortly after by the *Champion*. Those three tugs were the only tugs which were towing on the first of the three tides. The next vessels to come up were the *Aid*, bringing out the Ramsgate lifeboat, and the *Arcadia* and the *Premier*. So, on the second tide, there were six tugs towing. Finally, on the

1909

THE BUTESHIRE.

Bargrave Deane J.

third tide, the *Florida* and the *Lady Crundall* came up, and all eight tugs took part in the towage.

Now I have to apportion my award among all these claimants, and, to add to my difficulties, the values are not agreed. I have, to the best of my ability, to arrive at what I consider to be the fair value of the ship and her cargo. According to the plaintiffs the ship is worth 66,000*l.*, and her cargo 91,000*l.*, which makes a value of over 150,000*l.* According to counsel for the defendants the value of the ship is 28,000*l.*, and that of her cargo 67,759*l.* I have arrived at the following figures. The ship originally cost 73,000*l.* in 1893. She had repairs to the extent of 2000*l.* done in 1900, and in 1905 she underwent repairs to the extent of 10,000*l.* She is now valued at 28,000*l.* by her owners, but I find she was insured for 30,000*l.*, and that the machinery and stores on board her brought her insurance up to 60,000*l.* I take that as being beyond her full value, and I have taken 40,000*l.* as the fair value of the ship and machinery. The cargo is more difficult to assess, because I have very little means of judging. Counsel for the defendants put the value at about 67,000*l.*, and the other side says about 90,000*l.* I have taken a common course and split the difference—75,000*l.*—which gives a total value of 115,000*l.*

Now, of these tugs, some towed on three tides, some on two, and some on one, and there are also differences between them as to their values, horse power, tonnage, and other matters. I cannot go into all these details, but I have taken into account the damage sustained by some of the vessels, and, after considering with the Elder Brethren the nautical questions involved, I have come to the conclusion to award the following sums:—The *Lady Curzon*, 1460*l.*; the *Victor*, 870*l.*; the *Champion*, 850*l.*; the *Aid* and the Ramsgate lifeboat, 1000*l.*; the *Arcadia*, 750*l.*; the *Premier*, 600*l.*; the *Florida*, 600*l.*; the *Lady Crundall*, 870*l.*; and the Margate lifeboat, 275*l.*—total, 7275*l.*; and I certify for separate representation in each case.

Solicitors for plaintiffs the owners, masters, and crews of the tugs *Victor* and *Champion*, and the coxswain and crew of the Margate lifeboat: *C. J. Smith & Hudson.*

Solicitors for plaintiffs the owners, masters, and crews

1909

THE BUTESHIRE.

of the tugs *Lady Crundall* and *Lady Curzon*: *Mowll & Mowll.*

Solicitors for plaintiffs the owners, master, and crew of the tug *Arcadia*: *Clarkson, Greenwell & Co.*

Solicitors for plaintiffs the owners, master, and crew of the tug *Florida*: *Pritchard & Sons.*

Solicitor for plaintiffs the owners, master, and crew of the tug *Premier*: *Charles E. Harvey.*

Solicitors for plaintiffs the owners, master, and crew of the tug *Aid*, and the coxswain and crew of the Ramsgate lifeboat: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Buteshire*: *Lowless & Co.*

T. L. M.

1909

THE ANNIE.

March 18.

Admiralty — Ship — Collision — Close-hauled Vessels on Opposite Tacks— Narrow Channel—Overtaking—Action in personam—Claim for Compensation for Loss of Life—Remoteness of Damage—Regulations for Preventing Collisions at Sea, 1897, *arts.* 17 (*b*), 24—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58).

Two sailing flats were beating to windward at night down the Mersey, and in the process of tacking backwards and forwards across the river the plaintiff's flat gradually overtook the other; but before she had quite done so, and whilst the two vessels were on opposite tacks, they came into collision:—

Held, that, in the circumstances, the rule applicable was art. 17 (*b*) of the regulations for preventing collisions at sea, and, therefore, the defendants' vessel, which, at the material time, was close-hauled on the port tack, was to blame for not keeping out of the way of the plaintiff's vessel close-hauled on the starboard tack.

The anchor of the defendants' vessel fouled the painter of the boat which was towing astern of the plaintiff's vessel, and, in endeavouring to release the vessels by cutting the boat's painter, the master of the plaintiff's vessel was dragged overboard and drowned:—

Held, that the defendants, by the negligence of whose servants in the navigation of their vessel the accident was brought about, were liable for the sum paid by the plaintiff under the Workmen's Compensation Act, 1906, to the dependants of the master of the plaintiff's vessel, and

that this amount was recoverable as damages in the present action brought in admiralty in personam under the general jurisdiction of the High Court.

1909

THE ANNIE.

ACTION in personam for damages resulting from a collision, being the amount paid by the plaintiff to the dependants of the deceased master of his vessel under the Workmen's Compensation Act, 1906.

The plaintiff was William Cooper, owner of the *Julia*, of which Charles Mellor was master. The defendants, the Clares Lighterage Company, Limited, were the owners of the *Annie*.

On the evening of July 10, 1908, the weather being fine and clear, with a moderate south-westerly breeze, and the tide the first of the ebb of little force, the flat *Julia* left Widnes and proceeded under sail down the river Mersey, bound for the sand-bank opposite Garston for a load of sand. At about 10 P.M., when she was a little below Ditton Brook, close-hauled on the starboard tack, those on board observed that the flat *Annie*, which was also beating down the river, was standing, close-hauled on the port tack, towards the *Julia*, shewing her green light, and shortly afterwards the two flats came into collision, the *Annie* striking the *Julia* on the port side amidships with her stem and port bow, and then, sliding along the side of the *Julia*, her anchor fouled the painter of the boat which was towing astern of the *Julia*. The master (Charles Mellor) of the *Julia*, in order to get the two flats clear, cut the boat's painter; but before he could complete the operation he was (in the way indicated in the judgment) dragged overboard and drowned.

By his statement of claim the plaintiff charged those on board the *Annie* with, inter alia, failure to comply with art. 17 of the regulations for preventing collisions at sea, 1897 (1), by neglecting to keep out of the way of the *Julia*, and added:

Paragraph 7. "A claim for compensation having been made in respect of the death of the said Charles Mellor on behalf

(1) Art. 17. "When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:—

"(*b*) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack."

1909

THE ANNIE.

of his widow and children against the plaintiff, the plaintiff was obliged to pay the sum of 300*l.* as compensation under the provisions of the Workmen's Compensation Act, 1906."

Paragraph 8. "By reason of the said collision the plaintiff has suffered damage, including the payment mentioned in paragraph 7 hereof, and the said collision and the damage consequent thereon were solely caused by the improper and negligent navigation of the *Annie*, and were in no way caused or contributed to by any fault or default of the *Julia* or those on board of her."

According to the defence, the *Annie*—a cutter rigged flat, belonging to Runcorn, of forty-seven tons register, and manned by two hands, bound from the West Bank Dock, Widnes, to Birkenhead, under reefed mainsail—was on the port tack beating down the river, making between four and five knots, when those on board saw the two side lights of the *Julia*, a quarter to half a mile astern of the *Annie*, and noticed that she was rapidly overhauling them. When the *Annie* was on the starboard tack, it was alleged that the *Julia* was to the northward of her and about level with her in the channel. "On reaching the bank marking the southern limit of the channel the *Annie* proceeded to put about on to the port tack, but the *Julia*, which was then pressing her on the starboard tack instead of going about as she could and ought to have done, continued on the starboard tack, causing imminent risk of collision, and as she failed to give way the helm of the *Annie* was put hard up as the only chance of avoiding a collision, but having very little headway she answered her helm slowly, and the *Julia* coming on, with her port side grazed across the stem of the *Annie*, little or no damage resulting from the impact. . . . . After the collision the fluke of the *Annie's* anchor caught in the painter of the *Julia's* boat which was towing astern and remained fast. The masters of the two vessels then had a conversation as to what should be done, and it was agreed to cut the painter adrift and exchange boats. The master of the *Julia* then cut the painter, and instead of letting it go, held on to it, and was pulled overboard . . . ."

The defendants, inter alia, charged the *Julia* with attempting

—in breach of art. 22 of the regulations for preventing collisions at sea—to cross ahead of the *Annie*, and, in breach of art. 24 (1), "although an overtaking vessel improperly neglected to put about and give the *Annie* room when the latter was obliged to wind from the south shore."

By paragraph 13 of the defence the defendants objected that "the damages claimed in respect of the loss of life are too remote," and, by their amended defence, the defendants further contended that "the damages for loss of life are not recoverable in this action."

C. Robertson Dunlop and *A. Bucknill*, for the plaintiff, the owner of the *Julia*, were not called upon.

Laing, K.C., and *Dawson Miller*, for the defendants, the owners of the *Annie*. The *Julia* was alone to blame for not, as the overtaking vessel, putting about and giving the *Annie* room: *The Priscilla*. (2)

[BARGRAVE DEANE J. In this case the overtaking rule does not apply. The evidence shews that the collision did not take place, as alleged by the defendants, near the Cheshire side, but nearer mid-river, when the vessels were on opposite tacks, whilst in *The Priscilla* (2) the two vessels were both close-hauled on the same tack beating to windward, and it was held that it was the duty of the following vessel to have gone about at the time she saw the leading vessel go about on account of nearing a shoal.]

Secondly, the damages are too remote, for the chain of causation was broken, as the loss of life resulted from a supervening circumstance, that of the master of the *Julia*, several minutes after the collision had taken place, holding on to the painter too long; that is to say, in the words of Marsden on Collisions at sea, 5th ed. (1904) p. 112, summing up the result of the cases, "Damages which, although consequent upon the collision, do not immediately or necessarily flow from it, cannot be recovered against the ship in fault for the collision."

(1) Art. 24. "Notwithstanding anything contained in these rules, every vessel overtaking any other, shall keep out of the way of the overtaken vessel . . . ."

(2) (1870) L. R. 3 A. & E. 125.

1909

THE ANNIE.

Thirdly, a claim by way of damages in respect of a payment made under the Workmen's Compensation Act is not admissible in an admiralty action: *The Circe.* (1)

Dunlop, in reply. The damages claimed are not too remote, for the only inquiry in all these cases is whether the damage complained of is the natural and reasonable result of the defendants' act: it will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act, and reasonable human conduct is part of the ordinary course of things: see per Lindley L.J. in *The City of Lincoln.* (2)

The damages claimed are recoverable in this action, which is in personam, for there is no reason why a claim arising out of the Workmen's Compensation Act, 1906, should not be made in such an action brought in this Division under the general jurisdiction of the High Court since the Judicature Act.

The Circe (1) was an action in rem under the Admiralty Court Act, 1861 (24 Vict. c. 10): see the remarks of the President (Sir Gorell Barnes) in his judgment at p. 11 of the report, where he refers to *The Vera Cruz* (No. 2). (3)

BARGRAVE DEANE J. This is a case in which there is very little evidence before the Court—there are two witnesses from the *Julia* and practically only one from the *Annie*. This creates a difficulty, but I find the following facts from the evidence: that the *Julia* was following the *Annie* down until they got somewhere near Ditton Brook, and that she was in fact the overtaking ship; that these vessels were then tacking backwards and forwards across the river, the wind being a fairly strong south-westerly breeze; that at one time one of these vessels might have been a little ahead, according to the tack she was on, and at another time the other may have been ahead, on another tack, but that the *Julia* was gradually overtaking the *Annie*; and I think the fact that they came into collision proves that the *Julia* had not quite overtaken and passed her.

(1) [1906] P. 1.
(2) (1889) 15 P. D. 15, at p. 18.
(3) (1884) 9 P. D. 96.

1909

THE ANNIE.

Bargrave Deane J.

If the overtaking rule applied, I should hold that it was the duty of the *Julia* to keep out of the way of the *Annie*, and as she did not do so she would be responsible; but I am of opinion that the overtaking rule does not apply in this particular state of facts. There are certain rules connected with the overtaking rule which cannot possibly have any application in such a case as this. For instance, an overtaking ship must keep out of the way of the other vessel, and she must not cross ahead of her (art. 22). How is that to apply to a case where two vessels are tacking backwards and forwards in a narrow channel? The overtaken vessel must keep her course (art. 21). How can that happen in a case where the vessels are tacking backwards and forwards across a narrow channel? In my opinion such a state of things cannot apply to this particular matter which we are considering. Neither of these vessels could have kept a course, because they were tacking, and if one had kept her course and not altered she would have gone ashore. She was bound to alter. Therefore these principles could not apply to this case under the circumstances. I, therefore, have to see whether any other rule applies, and I am glad to avail myself here of the assistance of the Elder Brethren, and they advise me that it would be absolutely impossible for navigation to continue safely in such a condition of things as arises here if the overtaking rule applied in this case or in similar cases, and you must in the case of two vessels tacking backwards and forwards across a narrow channel strictly observe art. 17 (*b*), which says that the vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

Now in this particular case I apply that rule. It is quite clear that the master of the *Annie* thought that rule applied, and I think it is equally clear that the master of the *Julia* thought so too. The poor man is dead, but from what he did, or from what the mate said he did, it is clear he took that view also. Now there is only one exception to the principle which I have been attempting to put forward, and that is the question of what is to be done when two vessels are arriving at a point where both must tack. There we have the case of *The Priscilla* (1),

(1) L. R. 3 A. & E. 125.

1909

THE ANNIE.

Bargrave Deane J.

and I accept that case as laying down a good principle. No vessel must suddenly go about under the bows of another, and no vessel must keep her course and run into another vessel which she sees is going about. But that is quite a different matter. When they are actually under way, tacking, then you must have the crossing rule apply, and so here I find as a fact that this collision did not take place close to either shore, but one-third of the way over from the north to the south shore, and that both vessels were under way at the time, in the course of their board, one to the northward and the other to the southward.

In the circumstances I think the duty of the vessel on the port tack was to put her helm up and go off and give the other vessel room to pass, and not to hold on her course as she did and run into the other vessel. I think it is extremely likely, from what the master of the *Annie* said, that the real reason of this collision was that there was something wrong about the tiller of the *Annie*, so that they were unable for the moment to put it up and allow the vessel to pay off to starboard. That disposes, I think, of the question of responsibility. I hold that in this case art. 17 (*b*) applies, and not the overtaking rule, and that therefore the *Julia* is free from blame, and the *Annie* ought to have kept out of her way and is responsible for the collision.

Now comes the other question, whether the damages in this case are too remote. In my opinion they are not. I think that the damages flowed directly out of this collision. The only thing that can be said by the defendants is this, that the master of the *Julia*, by error of judgment at the last moment, when placed in a position of difficulty, put his hand on the rope outside of where he cut it, like a man who goes and sits on the bough of a tree outside of where he is sawing it off from the stem. The poor man had no idea that he had the whole weight of the other vessel dependent upon that small painter, and the fact was that, having cut the rope, before he could let go he was dragged overboard by the weight of the other vessel on it. I do not think that can be said to have been negligence on his part sufficient for me to say his death was not a matter which flowed directly from the collision. Therefore I must hold that this was

the direct result of the collision, and, as the action is in personam and was properly brought here under the general jurisdiction of the High Court, I give judgment for the plaintiff for the sum of 300*l.*, with costs on the High Court scale.

1909

THE ANNIE.

Solicitors for plaintiff, the owner of the *Julia*: *Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants, the owners of the *Annie*: *Weightman, Pedder & Co., Liverpool.*

T. L. M.

THE CARDIFF.

1909

March 1, 2.

Admiralty—Ship—Collision—Compulsory Pilotage — Practice — Evidence of Pilot.

Where, in an action of damage by collision, the defendants admit that the collision was caused by the negligent navigation of their vessel, but allege that they are not liable as such negligence was solely that of the pilot compulsorily in charge, and neither side calls the pilot, the Court will, in its discretion, afford him an opportunity of tendering evidence on his own behalf, if he so desire, subject to cross-examination by both sides.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the *Otterspool*; the defendants were the owners of the *Cardiff* and her freight.

On October 17, 1907, about 4 A.M., the *Otterspool*, a steamship of 2878 tons gross register, with engines of 245 horse power nominal, and manned by a crew of twenty-four hands all told, was at anchor, on account of the weather, in the river Humber, about a mile below the Holme Ridge gas buoy, which bore N.W. $\frac{1}{4}$ W. by compass, in the course of a voyage from Hull to Rotterdam with a cargo of coals. She was exhibiting the regulation lights for a vessel at anchor in the Humber. There was a gale from the E.N.E. with rain squalls at times, and the tide was ebb of the force of about two knots. In these circumstances she was run into, in the way indicated in the judgment, by the *Cardiff*, a steamship of 2807 tons gross register, with engines of

1909

THE CARDIFF.

280 horse power nominal, and manned by a crew of twenty-five hands all told, proceeding down the Humber on a voyage from Hull to Cardiff in ballast.

By the first paragraph of their defence the defendants admitted "that the collision mentioned in the statement of claim was caused by the negligent navigation of the *Cardiff*," but they said that "such negligence was solely that of the pilot of the *Cardiff*, and not of the defendants or their servants, and that at the time of the collision the pilot was a duly qualified pilot acting in charge of the *Cardiff* within a district where the employment of a qualified pilot is compulsory by law and the defendants are not answerable for any loss or damage caused by his fault or incapacity."

Laing, K.C., and *A. D. Bateson*, for the plaintiffs, the owners of the *Otterspool*.

Aspinall, K.C., and *Dawson Miller*, for the defendants, the owners of the *Cardiff*.

At the hearing on March 1 and 2, 1909, before Bargrave Deane J., assisted by two of the Elder Brethren of the Trinity House, the onus of proof being on the defendants, they began, and at the conclusion of the evidence on both sides, the pilot of the *Cardiff* not having been called, the learned judge intimated that the Court was in some difficulty, as the evidence of the pilot might be very material, and if he wished to give evidence on his own behalf he ought to be heard. The pilot of the *Cardiff* was accordingly called by the Court, but on being asked by the learned judge whether he would like to give evidence the pilot answered in the negative.

BARGRAVE DEANE J. This is a collision between two steamers of about the same size, 2800 tons or thereabouts, in the river Humber, and the parties agree as to the spot, which was something over a mile below the Holme Ridge gas buoy.

The story is that the *Otterspool*, having come out of dock, had gone down the river and brought up at this particular place, and was at anchor at the time. She had brought up because the

master thought that, being bound to Rotterdam, when he got out of the river he would have to go right in the teeth of the strong wind which was blowing, and I see that, from the records, the force of the wind was very considerable. In the opinion of the Court, however, the weather was not such as to make it unreasonable for a master to proceed to sea; and when it is remembered that the *Cardiff* was not bound to the eastward, but was bound to the southward, then she would not have the same reason for deciding not to go out beyond the Spurn. The Court is of opinion that there was nothing in the state of the weather that night to prevent the *Cardiff* from going out to sea and proceeding round to Cardiff. That is the main fault found by counsel for the plaintiffs in the conduct of the master of the *Cardiff*—that she ought not to have been under way. It is said that, apart from that, proper assistance was not given to the pilot, that the ship's log is unsatisfactory, that the engine-room log is unsatisfactory, and that on the whole the case is of such a character that there must have been some fault on the part of the crew.

I am of opinion that that allegation has not succeeded. It seems to me that the fault of this collision was entirely the fault of the *Cardiff's* pilot. I have given him the option of giving evidence if he thought fit, and he has not desired to do so. I do not use that at all against him, but he might perhaps have given us some information which would have helped the Elder Brethren and me the better to form an opinion on the nautical questions involved. I think in all these cases where an allegation is made that the fault is solely the fault of the pilot, the pilot should have the choice, if he likes, to give evidence, even though neither side call him, and then both sides can cross-examine him. I took that course in this case, and I shall take it myself in future. I do not say it is a rule of this Division, because I have no right to make rules—the President alone can do so—but I say now what I shall do in future cases.

The *Cardiff* passed the gas buoy at a distance, according to those on board her, of something like a cable to a cable and a half, and then was steering a course of S.E. by E., and that brought her, according to the evidence, to the place of the collision, because she saw a little on her starboard bow, immediately after

1909

THE CARDIFF.

Bargrave Deane J.

passing that gas buoy, the lights of the *Otterspool* at anchor. Now she has been described as being extremely light, high out of the water forward, and with her propeller not fully submerged. I think some fifteen inches of the propeller were out of the water. It may be—and this must be guesswork—that the pilot, knowing she was in that light trim, with that strong wind on the port bow, allowed too much for the force of the wind and went too much to the northward, and that very likely is the cause of this collision, because she was, according to the pilot of the *Otterspool*, out of the fairway. Why he got right up there when he had the rest of the river open to him I do not know.

The opinion of the Court is that upon the evidence as given no blame can be attributed to the *Cardiff* herself, and that the collision was solely caused by the bad navigation of the pilot. There will be judgment for the defendants with costs.

Solicitors for plaintiffs, the owners of the *Otterspool*: *Pritchard & Sons.*

Solicitors for defendants, the owners of the *Cardiff*: *Downing, Handcock, Middleton & Lewis, for Downing & Handcock, Cardiff.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1909
April 3, 6.

BRYDGES *v.* BRYDGES AND WOOD.

Divorce—Practice—Damages against Co-respondent—Order for Payment into Court—Death of Co-respondent—Liability of his Executor—Jurisdiction of Divorce Court to enforce Order.

On the hearing of a petition for divorce by a husband against his wife the jury assessed damages against the co-respondent at 1500*l.*, a decree nisi was pronounced, and the co-respondent was ordered "within one month from the service of the order to lodge in Court the said sum of 1500*l.*" Within a month of the order the co-respondent died without having paid the money into Court. On an application by the petitioner for an order against the executor of the co-respondent to pay the damages and costs out of the assets of his testator:—

Held (reversing the decision of the President), that there was no provision in the Divorce Act or Rules enabling the executor of a co-respondent to be brought before the Court, the action was a personal action and the cause of action did not survive, and that there was no remedy against the executor in the Divorce Court, and no order for payment could be enforced against the executor in that Court.

APPEAL from a decision of Sir J. Bigham, President.

The question raised by this appeal was whether the executor of a co-respondent who had been condemned in damages could be made liable in the Divorce Court to pay the damages and taxed costs out of the assets of his testator. The facts and the various orders giving rise to this question were shortly as follows:

The husband presented a petition for divorce on the ground of his wife's adultery with the co-respondent. The petitioner claimed damages against the co-respondent. The case was tried on March 4, 1908, when the verdict was given for the petitioner, and the jury assessed the damages at 1500*l.* A decree nisi for the dissolution of the marriage followed on this verdict, and the Court condemned the co-respondent in the costs incurred by the petitioner. An order was also made "that the said co-respondent do within one month from the service of this order on him lodge in Court the said sum of 1500*l.*, he undertaking not to part with his property meanwhile except to realize the said sum." On March 25, 1908, the co-respondent committed suicide without

C. A. 1909

BRYDGES v. BRYDGES AND WOOD.

having paid the money into Court. On March 30, 1908, the petitioner applied that the co-respondent's personal representative should continue the undertaking given by the co-respondent at the trial as to the payment of the damages, and for the appointment of a receiver of the estate of the co-respondent. No order was made on this application, the Court being of opinion that the estate was not in danger.

On May 16, 1908, the will of the co-respondent was proved by his brother, Walter F. Wood, the sole executor, and the estate was sworn at 3319*l.* On June 26, 1908, the petitioner's solicitors gave notice of the petitioner's claim to the solicitors for the executor. The claim was repudiated, but an offer was made to pay 750*l.* and costs in settlement. This offer was refused.

On September 23, 1908, the decree nisi was made absolute.

On November 30, 1908, on an ex parte application made by the petitioner, the Court ordered that the said W. F. Wood should pay the amount of the damages and the taxed costs to the petitioner, the petitioner undertaking to pay the same into Court, and restrained the said W. F. Wood from distributing the estate of the deceased co-respondent till the petitioner's claim was satisfied. On January 20, 1909, a further order was made that the said Walter F. Wood should pay to the petitioner's solicitors 177*l.* 19*s.* 7*d.*, being the amount of the petitioner's taxed costs.

On February 3, 1909, the petitioner issued a summons in chambers against the executor, the said Walter F. Wood, to shew cause why an order should not be made that he should pay to the petitioner the damages and taxed costs ordered to be paid by the co-respondent out of the assets which had come to his hands as executor of the estate of the co-respondent, on the petitioner undertaking to pay the same into Court, or in the alternative that he should pay the damages and taxed costs into Court out of the said assets as such executor, or for such other order as the Court should deem fit. This summons was adjourned into Court, and after argument,

Sir J. Bigham, President, considering that the difficulty (if any) was cured by the order of November 30, made an order on the executor to pay out of his testator's assets the amount of damages

and taxed costs to the petitioner on his undertaking to pay the same into Court to abide further order.

The executor appealed. The appeal was heard on April 3, 1909.

After the case was opened counsel for the respondents stated that they abandoned the order of November 30, that it had not been acted upon, and that they would take steps to have it discharged as irregular.

Buckmaster, *K.C.*, and *Bayford*, for the appellant. The order now under appeal was wrong; there is no jurisdiction to make an order against a person not a party to the suit to pay to a party damages some other person has been ordered to pay into Court. It was the co-respondent personally who was condemned in damages, and the Divorce Court has no jurisdiction over his executor. On the death of the co-respondent he ceases to be a party to the suit, and the proper course is to strike out his name; the suit cannot be revived against his executor. The High Court Rules as to reviver and abatement do not apply to the Divorce Court. Further, the co-respondent's death took place before the month was up and long before the decree nisi was made absolute. If the petitioner had died within six months, or if the decree nisi had not been made absolute, e.g., owing to collusion, the order for damages against the co-respondent would have dropped; the decree absolute is the one final decree in the suit: *Hyman* v. *Hyman*. (1) It is not possible in the Divorce Court to obtain a new order against another person not a party to the suit. An executor is not, and never can be, a proper party to a divorce suit. An order to pay money into Court is not an order upon which execution can be obtained.

Rawlinson, *K.C.*, *J. H. Murphy*, and *Victor Russell*, for the respondent. In cases where the co-respondent does not obey the order for payment into Court the usual practice is for the petitioner to apply to have the order amended by directing the co-respondent to pay the money to the petitioner on his undertaking to pay it into Court; the petitioner can then get a fi. fa. or make the co-respondent a bankrupt, or otherwise enforce the

(1) [1904] P. 403.

C. A. 1909

BRYDGES v. BRYDGES AND WOOD.

order on behalf of the Court. All that the President has purported to do is to follow the analogy of this practice against the executor, and this there was jurisdiction to do. The Court has jurisdiction to bring interested parties before it, and it can bring the executor of the co-respondent before it in this way to enforce its own order as against the property of the co-respondent, which he had undertaken not to part with.

When damages have been assessed like this against a co-respondent, there is an obligation on him to pay; the action ceases to be, so far as this liability is concerned, a personal action, and the co-respondent's estate can be made liable to discharge this obligation. The Court has power to enforce its own orders. The fact that the co-respondent died before the decree was made absolute does not affect his liability to pay these damages: *Waddell* v. *Waddell and Craig.* (1) [*Ex parte Muirhead, In re Muirhead* (2), *Pritchard* v. *Pritchard and Bean* (3), and *Patterson* v. *Patterson and Graham* (4) were cited as to the practice with regard to payment of damages in a divorce suit.]

The order was in fact final as to everything except the dissolution of the marriage, and the decree absolute takes effect from the date of the decree nisi: *Prole* v. *Soady.* (5)

Bayford, in reply. The Divorce Court has no power to revise or add parties except for particular purposes, e.g., variation of settlements where the power is given by statute. The executor can never be made a party.

Cur. adv. vult.

April 6. COZENS-HARDY M.R. I think this appeal should be allowed for the reasons stated in the judgment of Farwell L.J., which I have read and with which I entirely agree.

FARWELL L.J., after stating some of the material dates and facts, continued:—I am of opinion that the order of the President in this case cannot be supported; indeed, counsel have not attempted to maintain any of the reasons on which it is founded,

(1) [1892] P. 226.
(2) (1876) 2 Ch D. 22.
(3) (1870) L. R. 2 P. & M. 53.
(4) (1870) L. R. 2 P. & M. 189.
(5) (1868) L. R. 3 Ch. 220.

but have appealed to the inherent jurisdiction of the Court, in order (as they say) to enable proper effect to be given to the decrees nisi and absolute.

But the Court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties or as persons treated as if they were parties under statutory jurisdiction (e.g., persons served with notice of an administration decree or in the same interest with a defendant appointed to represent them), or persons coming in and submitting to the jurisdiction of their own free will, to the extent to which they so submit (e.g., creditors of a bankrupt executor, who has carried on business under a power in the will, coming in to claim against the testator's estate in order to obtain subrogation to the executor's right of indemnity). But the Courts have no jurisdiction to make orders against persons not so before them merely because an order made, or to be made, may or will be ineffectual without it. Even in the case of an injunction Lord Eldon says in *Iveson* v. *Harris* (1): "I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause. The old practice was that he must be brought into Court, so as according to the ancient laws and usages of the country to be made a subject of the writ." It is true that persons who are not parties to an action, and are therefore not bound by the injunction so as to be committed for a breach of it, may yet be made amenable to the jurisdiction of the Court if the injunction be negative, i.e., forbids something to be done, but it can only be done on the ground of contempt in obstructing the course of justice by acting or aiding and abetting in breach of an injunction of the Court; and this is the ground on which "servants and agents" are rendered liable for contempt whether they are mentioned in the order or not. The practice of mentioning them probably arose in order to give them warning: see *Seaward* v. *Paterson*. (2) But that is not this case, and I can see no ground on which it is possible to invoke any jurisdiction of the Court, inherent or otherwise, to support this order.

(1) (1802) 7 Ves. 251, at p. 256. (2) [1897] 1 Ch. 545.

C. A. 1909

BRYDGES v. BRYDGES AND WOOD.

Farwell L.J.

Turning to the judgment of the President, I find that in this case the verdict was given on March 4, but it is not, and could not be, contended that the verdict alone gives the petitioner any right to the damages; it is the decrees following on the verdict that give such right. But the only decree in this case made in the co-respondent's lifetime is the decree nisi together with the order to pay the damages and costs into Court. It is quite clear that such an order is not a judgment on which execution can issue, nor do I think that the undertaking embodied in the order makes any difference. It was not given by the executor, and if it is regarded as given to the Court, the executor could not be committed for disobedience to it; if it is to be regarded as a contract inter partes it must be sued on and enforced as such. I desire to add that the undertaking as entered in the order is such as ought never to have been taken; it prevented the co-respondent from parting with any of his property, even in payment of any debt, preferential or otherwise, or for his daily bread. Undertakings of this sort ought to be carefully framed and limited to some specific property. The Court may well require a man to give security if he wants an extension of time, but it ought not to put upon him an undertaking so wide that he cannot obey it.

Now, assuming that an order in this form, namely, directing payment into Court within a month, and an undertaking in the meantime had been made and given by and to the High Court, the nearest analogy would be in a foreclosure action in which the mortgagor at the hearing, when the usual decree is made, desires some privilege which the Court grants him on terms; assume that before decree absolute the mortgagor dies; it is, in my opinion, perfectly clear that the Court has no jurisdiction to make any order against the mortgagor's executor until he has been made a party to the suit under the Rules of Court. But these Rules of Court do not apply to the Divorce Division, and there is no provision in the Divorce Acts or Rules enabling the executor of a co-respondent to be brought before the Court. Moreover, the action is a personal action, and the cause of action does not survive; unless, therefore, the decree nisi prevents it, the petitioner's right has gone.

The result is, not that the Court can act on any inherent jurisdiction, but that there is no remedy against the executor in the Divorce Court; and this appears to me to be reasonable. The Divorce Court's jurisdiction is purely statutory, although it has absorbed not only the old ecclesiastical jurisdiction, but also the common law action of crim. con., as explained in *Bernstein* v. *Bernstein*. (1) If it was intended to extend the jurisdiction of the Court to persons other than the petitioner, respondent, and co-respondent personally, it was for the Legislature to provide for it, but it has not done so. When it became necessary to bring other persons before the Court (as in proceedings for variation of settlements) statutory provision was made for it. So far as the decree or order of March 4 is concerned, it appears to me impossible that the Divorce Court can enforce it in any way against the executor; if it can be enforced at all, as to which I express no opinion, it can only be by a common law action on it.

But the learned President has relied on subsequent orders. The co-respondent died on March 25; the decree was made absolute on September 23. At that date, therefore, the suit had abated so far as the co-respondent is concerned, and in my opinion the decree absolute had no effect upon his executor or his estate. If Sir F. Jeune's statement in *Hyman* v. *Hyman* (2), namely, "that the decree absolute is the one final decree in the suit," is to be taken literally and to its full extent, the decree nisi is also ineffectual against the executor; but I express no opinion on this, as it is not necessary for the decision of this case. On November 30, 1908, an order purports to have been made that the executor pay the damages and costs to the petitioner on his undertaking to pay the sum into Court; and on January 20, 1909, an order was made on the executor to pay the taxed costs to the petitioner. Neither of these orders was served on the executor, and no evidence is read in either of them. Apart from the objection that such orders cannot be made against a stranger to the suit, both these orders are irregular and ought to be discharged. There is, therefore, no order subsequent to decree nisi on which any reliance can be placed. The learned President

(1) [1893] P. 292, at p. 305. (2) [1904] P. 403, at p. 406.

C. A. 1909

BRYDGES v. BRYDGES AND WOOD.

Farwell L.J.

states that the decree nisi is equivalent to a judgment obtained against the deceased man, and he purports to apply Order XLII., r. 23. But this rule has no application to the Divorce Division (Order LXVIII., r. 1), and if it had it would not help matters, for the decree nisi did not make the co-respondent liable to execution, as he was only ordered to pay money into Court; and the rule, therefore, would not have applied even if the action were a High Court action and not a proceeding in the Divorce Court. The learned judge saw this difficulty and attempted to remove it by relying on the order of November 30, 1908, which I have already shewn was a hopelessly irregular and wrong order, and in the next place by amending the decree nisi by making it an order on the executor to pay the petitioner instead of into Court. This appears to me quite impossible; the learned judge had no power to do anything of the sort; the decree was for divorce against a living man; the suit abated at his death and cannot be revived; there is no jurisdiction to alter that decree now so as to make it a decree against the executor, who could never have been made a party to the divorce proceedings, and still less to make it appear to have been that which it was not, namely, an order to pay to the petitioner instead of into Court. If the co-respondent had lived, the Court could, no doubt, have made a fresh order on him after due service directing such payment, but it could not have altered its former order, which had been drawn up, passed, and entered. Whatever remedy (if any) a petitioner may have against the estate of a deceased co-respondent under the circumstances of this case, it is not to be obtained in the Divorce Division. This appeal must be allowed and the application dismissed with costs here and below; and the ex parte orders of November 30, 1908, and January 20, 1909, ought also to be discharged. No attempt has been made to support them, and I understand that steps will be taken to discharge them without any formal application to us.

Appeal allowed.

Solicitors: *Camp, Ellis & Co.; Lyell & Betenson.*

W. C. D.

[IN THE CONSISTORY COURT OF HEREFORD.]

1908
Oct. 9.

THE VICAR AND CHURCHWARDENS OF THE PARISH OF CLAVERLEY *v.* THE PARISHIONERS, LANDOWNERS, HOUSEHOLDERS, AND INHABITANTS OF CLAVERLEY.

THE CHURCHWARDENS OF THE PARISH OF CLAVERLEY *v.* THE VICAR, PARISHIONERS, AND INHABITANTS OF CLAVERLEY, AND ALL PERSONS INTERESTED IN THE SITTINGS OF THE PARISH CHURCH OF CLAVERLEY.

GATACRE AND LEGH *v.* THE VICAR AND CHURCHWARDENS OF CLAVERLEY.

Ecclesiastical Law—Faculty—Faculty Pew—Allotment of Church Seats by Churchwardens subject to Control of Ordinary—Duty of Churchwardens—Appropriation of Seats at all Services—Seats not to be filled up before Commencement of Service.

The churchwardens of a parish church have vested in them the allotment of seats in the body of the church amongst the parishioners subject to the control of the Ordinary and to the exemption existing in respect of faculty pews or seats. The allotment, however, in each case must be made in general terms so as to entitle the allottees to occupy the seats allotted to them at all the ordinary services held in the church; the churchwardens not being entitled to attach to the allotment a condition excluding any allottee from the right to attend in the seats allotted any of the ordinary services of the Church prescribed by the rubrics. Thus persons to whom the churchwardens have allotted seats in the body of the church are entitled by law to occupy the seats so allotted to them not only during the Sunday morning service, but also during the Sunday evening service and at the early Sunday morning service held for the administration of Holy Communion, as well as at the ordinary services held on Christmas Day, Ash Wednesday, and Good Friday, and at any other ordinary service held in the church whether on Sundays or on weekdays.

Moreover, up to the commencement of service the seats allotted by the churchwardens to parishioners cannot legally be occupied by other persons against the will of the persons to whom they have been allotted.

Observations as to the circumstances which would at the present day justify the Ordinary in decreeing a faculty for appropriating pews or seats to private individuals.

THIS was a cause of faculty instituted on behalf of the Reverend Thomas Henry William Harvey, clerk, the vicar, and William H. Hall and Charles A. Bannister, the churchwardens of the parish

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

of Claverley in the county of Salop and diocese of Hereford, against the parishioners, landowners, householders, and inhabitants of the same parish in special and all others in general, for the purpose of obtaining a faculty authorizing the removal of the existing pews and galleries of the church of Claverley and the carrying out of other alterations therein.

The citation with intimation issued in the suit on March 22, 1901, and was duly served on March 24, 1901, and on April 12, 1901, the cause came on to be heard before the Chancellor of the diocese of Hereford (Dr. Tristram, K.C.), when the Court ordered a supplemental citation, citing the vicar, parishioners, and inhabitants of the parish of Claverley and all persons interested in the sittings of the said church, to be served, and adjourned the hearing of the cause to June 4, 1901. At the adjourned hearing, the supplementary citation having in the meantime been duly served, a claim was made on behalf of Edward Lloyd Gatacre, a parishioner and large landowner in the parish of Claverley, to one or more seats in the church as faculty seats, and on October 4, 1901, the Court issued a faculty, no appearance having been entered to oppose the same, authorizing the churchwardens and their successors (in case the vicar should decline to be a party applying for the faculty) to carry out the alterations in the church as approved by the vestry, that is (so far as material to this report) to remove the galleries in the church and place stalls in the chancel of the church according to plans and specifications filed in the registry, for the use of the clergy and the choir, and in addition thereto, if the church committee and vestry should so determine, to erect or place seats in the chancel to be occupied as free seats (1), and it was expressly directed in a proviso inserted in the faculty that "it was not the intention of the Court to deprive the owners of houses to which pews or sittings had been annexed by virtue of a faculty granted by the Court of the Royal Peculiar of Bridgnorth (2) in 1834, without their consent in writing, of their right to have pews or

(1) See the judgment delivered by the Court on July 23, 1907, post, p. 201.

(2) Up to the date of an Order in Council passed for the purpose on December 19, 1846, the parish of Claverley was under the ecclesiastical jurisdiction of the Court of the

1908

CLAVERLEY (VICAR, &c.) v. CLAVERLEY (PARISHIONERS, &c.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &c.) GATACRE AND LEGH v. CLAVERLEY (VICAR, &c.).

sittings on the repewing of the nave and aisles of the church allotted to their respective houses for the accommodation of the same number of persons as can be seated in their present pews or sittings in lieu of the same, such allotment to be made by a committee consisting of the vicar, churchwardens, and other parishioners to be afterwards appointed by the Court, provided always that such sittings shall in so far as is practicable be allotted on the south side of the nave of the church and as near as is practicable to the sites of the pews or sittings for which they are being substituted, and such allotments shall be confirmed by an order of the Court after hearing any objection to the same taken by the allottees" . . . . "saving always to the Court the right of varying the faculty should it at any time appear advantageous to the said church so to do."

In the month of April, 1907, two petitions intituled "In the matter of the faculty for the restoration, repewing, &c., of the parish church of Claverley granted on October 4, 1901," were brought into the registry. One of these petitions was signed by the before-mentioned Edward Lloyd Gatacre, of Gatacre in the parish of Claverley, owner of the Gatacre estate, and alleged so far as material as follows:

That by virtue of a faculty granted by the then Royal Peculiar Court of Bridgnorth in the year 1834 for the new pewing of the parish church of Claverley the pews and seats were allotted according to a table set out in the petition (1); that the said E. L. Gatacre was at the date of the petition the owner of the Gatacre estates, including all the properties mentioned in the above-mentioned table; that a faculty

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Royal Peculiar of Bridgnorth, but by the Order in Council in question the Royal Peculiar of Bridgnorth was abolished, and the parish of Claverley for ecclesiastical purposes became part of the diocese of Hereford. See *London Gazette*, December 25, 1846, p. 5961.

The appendix (D) to the report of the Commissioners appointed to inquire into the practice and jurisdiction of the Ecclesiastical Courts in England and Wales, 1832, shews that the Royal Peculiar of Bridgnorth was at the date of that report locally within the limits of the diocese of Lichfield and Coventry.

(1) It appeared by this table that about forty-one sittings in respect of houses enumerated therein had been allotted to the occupiers.

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.) CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

was granted by the Chancellor of the diocese of Hereford for the restoration and reseating of the parish church of Claverley on October 4, 1901; that such faculty contained express provisions as to its not being the intention of the faculty to deprive without their consent in writing any of the owners of the estates and properties in the parish to which faculty pews or seats were annexed to houses erected thereon by virtue of the said faculty by the then Royal Peculiar Court of Bridgnorth in 1834 of their right to have pews and sittings on the repewing of the nave and aisles of the said church allotted to their respective houses for the accommodation of the same number of persons as could be seated in their pews or sittings in lieu of the same, such allotment to be made by the vicar, churchwardens, and other parishioners to be appointed by the Chancellor of the diocese, provided always that such sittings should so far as practicable be allotted on the south side of the nave of the church and as near as is practicable to the sites of the pews or sittings for which they are being substituted, and that such allotments should be confirmed by an order of the Consistory Court of Hereford after hearing any objections to the same taken by the allottees, and by the said faculty of October 4, 1901, a right was in fact reserved of varying such faculty should it at any time appear advantageous to the church so to do.

The petition further alleged that no such allotment had been made as directed by the faculty, and that the petitioner claimed to have pews and sittings allotted to him in lieu of those mentioned in the table set out in the petition in respect of certain houses and parts of the Gatacre estates set forth in a schedule to the petition, and concluded with a prayer that an allotment of such pews in accordance with the faculty of 1901 should be made in Court, and that the Court should make such order for the carrying out of the terms of that faculty so as to do justice to the petitioner and all parties concerned, and for that purpose to vary or amend such faculty or take other necessary steps.

The other of the two above-mentioned petitions was filed on behalf of Edith Selina Legh, of Chyknell Hall in the parish of Claverley, at the date thereof the owner of the Chyknell estate, and, with the necessary alteration that it referred to and set

out in schedules thereto the pews and sittings allotted to the petitioner under the faculty of 1834 and those she desired to have allotted in lieu thereof, was for the most part in the same terms mutatis mutandis as the above-mentioned petition of E. L. Gatacre, but in addition alleged that the vicar and churchwardens had refused and neglected to make the allotment of pews in accordance with the terms and directions of the faculty of October 4, 1901, although application had been made to them to do so. (1) The prayers of the two petitions were practically identical.

Objections were brought in on behalf of the vicar and churchwardens of Claverley to each of the above-mentioned petitions. Each of the sets of objections contained the following material allegations:—

"1. The respondents object to the claim of the petitioner to have the said pews and sittings allotted to the petitioner on the ground that such allotment is unnecessary and inconvenient and unsuitable to the requirements of the present time. Such allotment would infringe upon the due accommodation of the parishioners and would preclude them from attending the services of the church.

"2. The respondents do not admit the faculty mentioned in the petition and alleged to have been granted by the Royal Peculiar Court of Bridgnorth in 1834.

"3. Even if such allotment was made as alleged in the petition (which the respondents do not admit), such allotment was never sanctioned by faculty and conferred upon the petitioner no legal title to the said pews and sittings; moreover, such allotment would be permissive merely and liable to readjustment at any time, and is wholly inapplicable to the requirements of the present day.

"4. The proviso contained in the faculty for the restoration of the parish church of Claverley in 1901 had reference to such faculty pews and sittings (if any) as might have been in existence at that date. The respondents do not admit that the

(1) It appeared from the petition of E. S. Legh that about sixty-eight sittings had been under the faculty of 1834 allotted to houses included in the Chyknell estate.

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

petitioner is the owner of any house in the said parish to which any pews or sittings are annexed by virtue of any faculty or prescriptive right."

The following objections numbered 5, 6, and 7 were made to the petition of E. L. Gatacre only :—

"5. Prior to the restoration of the parish church of Claverley there were 629 seats in the church, of which 258 in the galleries were free and unappropriated, and these have been removed under the said faculty. At the present time there are only 270 seats available for the parishioners in the said church and there are 1400 parishioners in the parish. A fair distribution of the available seats should be left to the discretion of the churchwardens, having due regard for the accommodation of the poor as well as of owners of property.

"6. The congregations since the restoration of the church have very largely increased owing to the more convenient accommodation of the parishioners attending the services of the church, and the respondents submit that it would be detrimental to the interests of the church and the parishioners if pews and sittings were to be allotted on the basis of any alleged allotment in 1834.

"7. Suitable sittings are available and have always been found for the petitioner whenever required, and no inconvenience has resulted from the absence of the allotment claimed."

The objections to the petition of E. S. Legh further stated that the respondents did not admit that they refused or neglected to allot pews or sittings to the petitioner as alleged, and that in 1904 the petitioner was given permission by the churchwardens to occupy four pews or twenty-four sittings, being suitable and adequate for the requirements of the petitioner.

1907. May 29, 30. On these days the above-mentioned petitions of Edward Lloyd Gatacre and Edith Selina Legh were heard before the Chancellor of the diocese of Hereford (Dr. Tristram, K.C.).

Le Maistre appeared for the petitioner Edward Lloyd Gatacre.

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

The petitioner Edith Selina Legh was represented by her solicitor.

Harold Hardy appeared for the vicar and churchwardens of the parish of Claverley.

The result of the evidence of several witnesses examined on behalf of the petitioners and of the vicar and churchwardens appears from the judgment.

Cur. adv. vult.

1907. July 23. DR. TRISTRAM. On April 12, 1901, the then vicar of the parish of Claverley, the Reverend William Harvey, on behalf of himself and Mr. William Hall and Mr. Charles Bannister, the churchwardens of the parish and petitioners in the case, moved the Court to decree a faculty authorizing them to remove the gallery from the west end of the church, to repew the church, and to make other alterations and improvements in it. After the vicar had moved for the faculty and had given evidence in support of his application, Mr. Bannister, the vicar's churchwarden, stated in his evidence that it had been resolved at a vestry meeting held in reference to the proposed faculty that the seats on the north side of the nave should be appropriated as free seats, and that an arrangement should be made by which the pews on the south side of the nave should be allotted to the holders of seats claimed under a faculty of 1834 which had been issued by the judge of the Royal Peculiar of Bridgnorth, within the limits of which for ecclesiastical purposes the parish of Claverley then was. By virtue of this faculty the vicar and churchwardens of the parish of Claverley were authorized to repew the body of the church and the chancel and to erect a gallery at the west end of the church for the accommodation of one hundred and fifty persons of the working classes, and were directed to allot the pews and sittings in the nave and chancel of the church amongst the principal householders of the parish. The vicar's churchwarden then proposed that the faculty applied for should be framed to give effect to this arrangement which had been approved of by the vestry. The vicar thereupon stated that he objected to recognize the allotment of seats under the said faculty and declined

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

Dr. Tristram.

to be a party to an application for such a purpose, and immediately withdrew from the Court. Mr. Bannister thereupon, on behalf of himself and his co-churchwarden, applied to the Court to make an order for the issue of a supplemental citation, citing all persons interested in the allotted seats to appear and shew cause why a faculty should not issue to give effect to the above terms. I decreed the citation asked for to issue and adjourned the further issue of the cause to June 4, 1901, at the church of St. Magdalene, Bridgnorth. The churchwardens and Mr. Edward Lloyd Gatacre appeared before me at the adjourned hearing, the latter claiming his right to one or more seats in the church as faculty seats. I took time to consider my judgment. On October 4, 1901, I issued a faculty. [Dr. Tristram recapitulated the material provisions of the faculty as above set out, and proceeded :—] Some time afterwards complaints were made to me on behalf of Mr. Gatacre and Mrs. Legh, another parishioner and large landowner in the parish, that the churchwardens had been themselves allotting seats contrary to the provisions contained in the faculty, and requesting me to make an order for allotments to be made in the manner prescribed in the faculty, but to be subsequently confirmed by the Court. Negotiations between the churchwardens and Mr. Gatacre and Mrs. Legh to come to terms having failed, in April, 1907, both Mr. Gatacre and Mrs. Legh filed petitions in the registry, praying me as Chancellor of the diocese of Hereford to hold a Court at Claverley and there to make allotments of pews in accordance with the faculty of October 4, 1901, and to enforce the carrying out of the terms of such faculty and to do justice to all parties. The present vicar, the Reverend Charles Harris, and Mr. William Henry Hall and Mr. Charles Arthur Bannister filed objections in writing to the matters alleged in the said petitions. I thereupon directed the questions raised between the parties to be heard before me at a Court to be held in the town hall of Bridgnorth on May 29, 1907. At the hearing Mr. Le Maistre appeared as counsel for Mr. Gatacre, Mr. R. F. Haslewood appeared as solicitor for Mrs. Legh, and Mr. Harold Hardy as counsel for the vicar and churchwardens. Mr. Gatacre's counsel claimed for his client,

1908

CLAVERLEY (VICAR, &c.) v. CLAVERLEY (PARISHIONERS, &c.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &c.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &c.).

Dr. Tristram.

whose family had been settled at Gatacre for upwards of one thousand years and were owners of considerable property in the parish, the right to a faculty pew which prior to the recent alterations in the church was a large square pew, capable of holding ten persons, just opposite the pulpit. In support of that claim Mr. Gatacre's solicitor produced a deed poll dated December 19, 1776, under the seal of the Official Principal of the Court of the Royal Peculiar of Bridgnorth, reciting that Edward Gatacre, Esquire, had paid considerable levies to the reparation of the parish church, and that he and his family without hindrance had enjoyed a pew standing near the east end of the church, and that he was desirous to make an alteration in the said pew so that it might be six feet square, for the sole use of himself and his family, whereupon the Official Principal of the Court granted his licence and faculty to the said Edward Gatacre for the said purposes above mentioned. Mr. Gatacre in his evidence stated that he remembered the family pew opposite the pulpit during the lives of his father and grandfather and had sat in it himself for sixty years, and that he knew that his father had supplied everything that was wanted for the pew, that he recollected him repairing it after the death of his grandfather, which took place in 1849, when he had the lock mended and hat pegs put up inside, and that the wood was so strong as not to need repairing.

Upon this evidence the Court is of opinion that Mr. Gatacre is entitled to have a pew allotted to him in the body of the church, capable of holding ten persons, as a faculty seat in lieu of his faculty seat which was pulled down in the recent alterations and on the site of which the present organ stands.

The next question for the consideration of the Court is whether the pews and sittings allotted by reason of the faculty granted by the Court of the Royal Peculiar of Bridgnorth in 1834 can be claimed by the allottees as in law faculty pews or sittings, and the Court is of opinion that this claim has not been established by the evidence produced at the hearing of the case for the following reasons. In the first place, no faculty has been produced from the archives of the Bridgnorth Court or any allotment or instrument by the churchwardens granting the

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.) GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

Dr. Tristram.

seats allotted to the allottees as faculty seats in terms similar to those contained in the instrument confirming Mr. Edward Gatacre in his faculty seat. Secondly, there is no indication in the evidence before the Court that the allottees of these pews or sittings had made any substantial contributions towards the erection of the gallery at the west end of the church to provide free sittings for the working classes, or towards the cost of repairing the seats in the nave and chancel of the church, such as to justify the Bridgnorth Court in granting the seats allotted to them as faculty seats.

The usual grounds for making such grants are that the applicant for a faculty pew has subscribed liberally towards the improvement or enlargement of the church and is prepared at his own cost to erect the pew to be appropriated for the use of himself and his family and his successors in his family residence; also that he is the owner of considerable property in the parish and resides in a house on his property, and that the faculty seat is granted to him and his successors in the family house subject to their keeping the pew in repair.

Mr. Hardy during his argument directed my attention to the following observations made by Sir John Nicholl in the Arches Court of Canterbury, in the case of *Fuller* v. *Lane* (1), as pertinent to the circumstances of the present case. In his judgment in that case Sir John Nicholl said: "By the general law and of common right all the pews in a parish church are the common property of the parish: they are for the use, in common, of the parishioners, who are all entitled to be seated, orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens as the officers, and subject to the control of the Ordinary. Neither the minister nor the vestry have any right whatever to interfere with the churchwardens, in seating or arranging the parishioners, as often erroneously proposed: at the same time, the advice of the minister, and even sometimes the opinions and wishes of the vestry, may be fitly invoked by the churchwardens; and to a certain extent may be reasonably deferred to in this matter. The general duty of the

(1) (1825) 2 Add. 419, 425.

1908

CLAVERLEY (VICAR, &c.) v. CLAVERLEY (PARISHIONERS, &c.) CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &c.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &c.).

Dr. Tristram.

churchwardens is to look to the general accommodation of the parish, consulting as far as may be that of all its inhabitants. The parishioners, indeed, have a claim to be seated, according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of all the parishioners to be seated, if sittings can be accorded them. Accordingly they are bound, in particular, not to accommodate the higher classes, beyond their real wants, to the exclusion of their poorer neighbours; who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation; supposing the seats to be not all equally convenient." The learned judge proceeded to say that in former times faculties had been granted with too great facilities, and that it had not been unusual, after churches had been new pewed, to appropriate by faculty certain pews to messuages or farmhouses, but that it is now the duty of the Ordinary, owing to the increase of the population and other circumstances, to grant faculties for pews with the greatest prudence and circumspection.

In the present case there can be no doubt that the Official Principal of the Court of the Royal Peculiar of Bridgnorth granted a faculty to the vicar and churchwardens of Claverley authorizing them to repew the church and erect a gallery at the west end of the church. This is apparent (1.) By the indorsements on the back of the instrument produced containing the allotment of pews previous to 1901 by the words following—"By virtue of a faculty granted in 1834 for the new pewing of the said church and allotting the pews therein by the churchwardens," and underneath are the names of G. H. B. Osbert, minister, and William Falkner, John Wilson, churchwardens; and (2.) By an entry in the vestry accounts, dated May, 1835, that Mr. Hardwick, the solicitor employed by the churchwardens to obtain the faculty, had paid to Mr. Sparks, the registrar of the Bridgnorth Court, 18*l.* 14*s.* 7*d.* for the costs of the faculty. According to the practice in the Ecclesiastical Courts the original faculty should have been transmitted by the registrar of the Court to the churchwardens of the parish, but according to the evidence the faculty of 1834 is not amongst the parish papers, and Mr. Beddoe, who was appointed registrar of the

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

Dr. Tristram.

Bridgnorth Court on the death of Mr. Sparks, stated in his evidence that from inquiries he had made he believed that all the papers relating to the proceedings in the Bridgnorth Court had been destroyed on Mr. Sparks' death. Had they been in existence, there would have been an entry of the order for the issue of the faculty as well as a draft of the faculty. Where churches have been ordered under a faculty to be enlarged, restored, or repaired, it is not unusual for the Chancellor of the diocese to direct commissioners selected by him, including the vicar and churchwardens of the parish, to re-allot a certain number of seats in the church in the following cases:—(1.) where there have been a large number of faculty seats in the church; (2.) where the funds required for the enlargement or improvement of the church have mainly been subscribed by parishioners who are desirous of having faculty pews annexed to their residences; (3.) where there have been a considerable number of pews previously allotted by the churchwardens as annexed to houses in the parish; and in the above cases there is a proviso usually inserted in the faculty that the allotments made by the commissioners are to be confirmed by an order of the Court to be embodied in the faculty. In the present case there is no trace of any such provision having been inserted in the faculty of 1834. The allotment of seats and sittings then made by the churchwardens were therefore liable to be varied by subsequent churchwardens under a change of circumstances, subject of course to the parties interested in the previous allotment having a right to appeal to the Chancellor of the diocese against changes made by the new allotments injuriously affecting their interests.

Mr. Le Maistre's contention was that the Court should presume that the allotments made by the churchwardens in 1834 had been subsequently sanctioned by an order of the Official Principal thereby constituting them faculty seats.

This presumption, in my opinion, would be inconsistent with the decision given by Sir John Nicholl in *Fuller* v. *Lane* (1) in the Arches Court of Canterbury, which was the Appellate Court of all the Diocesan Courts within the province of Canterbury,

(1) 2 Add. 419, 425.

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

Dr. Tristram.

but not of Ecclesiastical Courts in a Royal Peculiar—their Appellate Court being formerly the Court of Delegates and subsequently the Judicial Committee of the Privy Council. (1) The judgment was delivered in 1825, only nine years before the faculty of 1834 for the allotment of seats in the case before the Court was issued, and in that judgment the learned judge ruled that the practice which had formerly prevailed of Ecclesiastical Courts granting with great facility faculty seats in a church on its being repewed should be discontinued, and that, owing to the increase of population and other changes of circumstances, faculties for pews should in future be granted with the utmost prudence and circumspection. It is extremely improbable that within nine years after the Dean of the Arches had intimated in such clear language his opinion that the former practice of granting faculty seats indiscriminately should no longer be adhered to, but that they should in future be only granted with the greatest prudence and circumspection, the judge of the Bridgnorth Court should openly dissent from the ruling of the Arches Court of Canterbury by granting two hundred and forty faculty seats in the nave and chancel of this small church, even though the appeal from the Court of the Royal Peculiar of Bridgnorth lay direct to the Judicial Committee of the Privy Council.

As to costs, my order will be for each of the three parties to pay his own costs and each of them to pay one-third of the Court fees.

I should add that, owing to the fact that for upwards of seventy years the allotments of 1834 were generally considered by the seatholders to have thereby conferred on them faculty seats, it was consequently in the interest of the parish that the question whether or not they were faculty seats should be referred to this Court for inquiry and for its decision thereon.

Subsequently Dr. Tristram inspected the church and issued directions to the churchwardens as to their making the allotments of seats according to the terms of the faculty of 1901, but

(1) See *Smith* v. *Smith*, (1831) 3 Hagg. 757, at p. 763, where the jurisdiction of the Royal and Exempt Peculiar of the Deanery of Bridgnorth was one of the jurisdictions actually before the Court; *Pierson* v. *Gell*, (1762) Rothery's Return of Cases before the Delegates, No. 171.

1908

CLAVERLEY (VICAR, &c.) v. CLAVERLEY (PARISHIONERS, &c.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &c.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &c.).

up to the middle of the month of June, 1908, no report as to the allotment of sittings recommended to be allotted by them having been brought into the registry, notice was, by the directions of Dr. Tristram, given to the parties in the suit that on June 23, 1908, a Consistory Court would be held at Claverley for further hearing the suit and finally settling the allotments of seats in the church.

A return of the allotments proposed to be made by the churchwardens in favour of Mr. Gatacre's tenants and Mrs. Legh and her tenants was subsequently filed in the registry before June 23, 1908, together with a notice in the following words:—

"The churchwardens of Claverley in accordance with their promise have with great diligence and after duly considering the claims and requirements of the parishioners made an allotment of seats in Claverley Church for the eleven o'clock service on Sundays to be in force from Easter, 1908, to Easter, 1909. They have also decided that at the Sunday evening service all the seats except the two assigned to Mr. Gatacre shall be unappropriated and their said allotment had been approved of at the Easter vestry of 1908 by twenty-two votes to one, the dissentient being Mrs. Legh."

1908. June 23. The cause came on again for further hearing before the Chancellor of the diocese of Hereford for the allotment of seats in the body of the church to be settled by the Court, excluding from such allotment the faculty pew granted to the petitioner Edward Lloyd Gatacre.

Ernest Charles appeared for the petitioner E. S. Legh.

Harold Hardy appeared for the vicar and churchwardens of the parish of Claverley.

The petitioner E. L. Gatacre was represented by a member of the firm of his solicitors.

The points raised in argument sufficiently appear from the judgment.

DR. TRISTRAM. This is a faculty cause which has been before the Court on three previous occasions, in which legal questions of novelty and importance were raised.

1908

CLAVERLEY (VICAR, &c.) v. CLAVERLEY (PARISHIONERS, &c.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &c.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &c.).

Dr. Tristram.

Mr. Le Maistre appeared as counsel for Mr. Gatacre, Mr. Ernest Charles for Mrs. Legh, and Mr. Harold Hardy for the vicar and churchwardens.

The material facts for my decision on the questions raised in the case are as follows. In 1834 the parish of Claverley, though locally in the diocese of Hereford, was for ecclesiastical purposes within the limits of the Royal Peculiar of Bridgnorth, and in that year the Official Principal of that Royal Peculiar issued a faculty to the vicar and churchwardens of the parish of Claverley. [Dr. Tristram then proceeded to refer to the contents of the faculty decreed in 1834 by the judge of the Royal Peculiar of Bridgnorth in the words of his former judgment of July 23, 1907, and continued:—] There was evidence in a document preserved in the church that the vicar and churchwardens of the parish had allotted all the seats and sittings in the nave and chancel of the church amongst householders in the parish.

On October 4, 1901, I issued a faculty authorizing the churchwardens and their successors to make certain alterations in the church, which had been approved of by the vestry, and which I considered would be a great improvement to the church.

The vestry had also approved of a scheme by which all the seats on the north side of the nave were to be reserved as free seats for the working classes, and the seats on the south side of the nave were to be allotted amongst the householders as far as practicable to whom seats had been allotted by a former vicar and churchwardens under the faculty of 1834.

In the faculty I had issued I gave directions to the vicar and churchwardens to make, after the alterations in the church were completed, an allotment of the sittings as arranged by the vestry, subject to the allotments made by them being confirmed by me.

In consequence of my order not having been carried out by the vicar and churchwardens, Mr. Gatacre and Mrs. Legh in April, 1907, filed petitions in the registry praying the Court to allot to them and their tenants respectively seats in the south nave of the church, and to hold a Court for that purpose.

On May 29, 1907, I held a Court at Bridgnorth, at which Mr. Le Maistre, on behalf of Mr. Gatacre, submitted that his claim to a faculty pew in the church was beyond dispute. This claim,

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

Dr. Tristram.

as I stated in my judgment in this case delivered by me on July 23, 1907, was allowed. Mr. Le Maistre, on behalf of Mr. Gatacre, further contended that the seats allotted under the faculty of 1834 were in law faculty seats and could not be varied without the consent of the allottees. At the close of the arguments in the case I reserved my judgment, which I delivered, as before stated, on July 23, 1907, and in which I held that, there being no evidence of the allotment by the vicar and churchwardens in 1834 having been confirmed by the Ecclesiastical Judge of the Royal Peculiar, they must be treated as made merely by the churchwardens and liable to be varied by their successors under a change of circumstances. After the delivery of my judgment I proceeded to Claverley and inspected the church for the purpose of arranging for the allotment of sittings on the south side of the nave.

The church previously to the alterations made in it under the faculty of 1834 was remarkable for its merits as a fine specimen of Norman architecture, which under the faculty I had issued on October 4, 1901, at the cost of several thousand pounds had been restored in perfect good taste to what it was prior to the alterations of 1834. After some discussion the churchwardens stated that they could not without further and mature consideration make the allotments required. I then requested them to report to me the sittings they would be prepared to allot to Mr. Gatacre's tenants and to Mrs. Legh and her tenants. But on their having failed up to June, 1908, to file in the registry a report of the allotment of sittings they recommended, I directed notice to be given to them and to the parties in the suit that I would attend on June 23, 1908, at the church with a view of finally settling the allotments of seats and sittings to Mr. Gatacre's tenants and to Mrs. Legh and her tenants. Before that date I received a return of the allotments which the churchwardens proposed to make in favour of Mr. Gatacre's tenants and of Mrs. Legh and her tenants, and annexed to the return a notice in the following words: [Dr. Tristram read the notice filed with the return as above set out, and continued:—]

The churchwardens by the allotment filed allotted one seat to Mrs. Legh in respect of Chyknell and one for her servants,

1908

CLAVERLEY (VICAR, &c.) v. CLAVERLEY (PARISHIONERS, &c.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &c.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &c.).

Dr. Tristram.

and seventeen seats for her tenants as occupiers of houses on her estate in which they resided, and nine seats were allotted to the tenants of Mr. Gatacre in respect of houses on his estate in which they resided.

On my attending at the church on June 23, 1908, the vicar and churchwardens were present, also Mr. Gatacre and Mrs. Legh, the latter being represented by Mr. Ernest Charles as her counsel, who objected to the allotment of seats being made for one year only, also to their being subject to be altered from year to year; also to Mrs. Legh and her tenants and the tenants of Mr. Gatacre being deprived of their right of occupying their seats during the Sunday evening services and at early Communions on Sunday mornings, on the ground that there was no authority for attaching such conditions to allotments made by churchwardens.

I then stated that the Court would not vary the allotments of the sittings made by the churchwardens in respect of Mrs. Legh and her tenants, or in respect of the tenants of Mr. Gatacre, but would amend it by an order declaring that Mrs. Legh and her tenants and Mr. Gatacre's tenants, to whom seats have been allotted by the churchwardens, are in law entitled to sit in such seats not only during the Sunday morning service, but also during the Sunday evening service and at the early Sunday morning service held for the celebration of Holy Communion, as well as at the ordinary services held on Christmas Day, Ash Wednesday, and Good Friday, and at every other ordinary service held in the church as prescribed by the rubrics. I stated that this amendment would be made by the Court on the ground that no authority in law or precedent had been furnished to the Court to justify its sanctioning such conditions being attached to allotments of sittings made by churchwardens, but that, as this was the first time that the right of churchwardens to annex such conditions to an allotment of sittings had been raised, in case the vicar and churchwardens should wish to appeal against my decision, after I had had an opportunity of looking into all the cases bearing on the subject, I would deliver a written judgment before making my final order in the matter.

Cur. adv. vult.

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

On October 9, 1908, the following judgment was accordingly delivered by

DR. TRISTRAM. Since I delivered my previous judgment in this case on June 23 last I have looked carefully into the cases decided in the Ecclesiastical and Common Law Courts dealing with the duties of churchwardens and of the Ordinary and the rights of parishioners as regards the allotment of sittings in the body of churches.

Before the Reformation no seats were allowed for the use of parishioners in a church, except in private chapels erected by noblemen and laymen for the private use of them and their successors, in which the fee simple of the chapel was vested in the owner: 2 Phillimore's Ecclesiastical Law, p. 1424.

The first case reported on the subject after the Reformation is the case of *Corven* v. *Pym* (1), in which it was held, "But for a seat in the body of a church, if a question ariseth concerning it, it is to be decided by the Ordinary, because the freehold is in the parson, and the place is dedicated and consecrated to the service of God and is common to all the inhabitants; and therefore it belongs to the Bishop to order it, in such manner as the service of God may be best celebrated, and that there be no contention in the Church."

Again, in a work of great authority published in 1750, Watson's Clergyman's Law, it is stated that "the authority of appointing what persons shall sit in each seat" in a church "is in the Ordinary" (p. 389).

The notes to *Corven* v. *Pym* (1) in the last edition of Lord Coke's Reports contain a list of the various cases decided in the Ecclesiastical and Common Law Courts, with grounds on which the decisions were given, in reference to the duties of the churchwardens and of the Ordinary and to the rights of parishioners as regards the allotment of sittings in a church. It will therefore be only necessary for me to cite a few of the cases on this subject.

Thus in *Pettman* v. *Bridger* (2) Sir John Nicholl says: "By

(1) (1604) 12 Rep. 105. (2) (1811) 1 Phillim. 316, at p. 323.

1908

CLAVERLEY (VICAR, &c.) v. CLAVERLEY (PARISHIONERS, &c.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &c.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &c.).

Dr. Tristram.

the general law and of common right all pews belong to the parishioners at large for their use and accommodation; but the distribution of seats among them rests with the ordinary; the churchwardens are the officers of the ordinary;—they are to place the parishioners according to their rank and station; but they are subject to the control of the ordinary, if any complaint should be made against them. The vestry, as such, has no authority whatever on the subject;—the churchwardens are not bound to follow their directions; at the same time the sense and opinion of the vestry ought to have weight with them." See also the decisions of Sir John Nicholl to the same effect in *Fuller* v. *Lane* (1) in 1825.

Again, Lord Stowell in *Groves and Wright* v. *The Rector of Hornsey* (2) says that every man who settles as a householder in a parish has a right to call on the parish for a seat, and a parishioner on the allotment to a seat in his church by the churchwardens acquires a possessory right to it. Again, in the case of *Walter* v. *Gunner and Drury* (3) Lord Stowell says that if the churchwardens refuse to allot a seat to a householder in his parish church, he is entitled to cite them before the Ordinary for such refusal, and if there is a suitable vacant seat for him in the church, it is the duty of the Chancellor to decree a monition to issue to the churchwardens to seat him in that pew. (4)

Again, in *Pettman* v. *Bridger* (5) Sir John Nicholl says "that a possessory right is not good against the churchwardens and the ordinary;—they may displace, and make new arrangements; but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them;—the possession therefore will have its weight;—the ordinary would give a person in possession cæteris paribus the preference over a mere stranger."

"A possessory right is sufficient to maintain a suit against a mere disturber;—the fact of possession implies either the actual or virtual authority of those having power to place. The disturber must shew, that he has been placed there by this authority,—

(1) 2 Add. 425 and 426.
(2) (1793) 1 Consist. 188, 194, 195.
(3) (1798) 1 Consist. 314.
(4) 1 Consist. 314, at p. 323.
(5) 1 Phillim. 316, at p. 324.

1908

CLAVERLEY (VICAR, &C.) v. CLAVERLEY (PARISHIONERS, &C.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &C.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &C.).

Dr. Tristram.

or must justify his disturbance by shewing a paramount right—a right paramount to the ordinary itself, namely, a faculty, ... or if there be no proof of a faculty,—there may be proof of prescription and such immemorial usage as presumes the grant of a faculty."

A possessory right is also sufficient to maintain an action against a mere disturber in the Common Law Courts — e.g., in the case of *Kenrick* v. *Taylor* (1), where the possessor of a pew brought an action in the Court of Common Pleas for disturbance, it being suggested on behalf of the defendant that to entitle the plaintiff to succeed in the action he should prove that repairs had been done to the pew either by himself or by his predecessors in title, Lee C.J. in delivering the judgment of the Court said: " . . . . but we are all of opinion that this being a possessory action against a stranger, and a mere wrong-doer, the plaintiff was not obliged to prove any repairs done by himself or others whose estate he hath; for it is a rule of law, that one in possession need not shew any title or consideration for such possession against a wrong-doer. But it is otherwise, where one claims a pew, or an isle in a church against the ordinary, who undoubtedly has prima facie the disposal of all the seats in the church, and against him a title or consideration must be shewn."

The whole Court were clearly of opinion that possession, and laying it to be appurtenant to the house, was sufficient against a mere stranger, and relied upon the case of *Buxton* v. *Bateman*. (2)

The last case I will refer to is that of *Crisp* v. *Martin*. (3) In that case the vicar and churchwardens of the parish of Grantchester, in the diocese of Ely, petitioned the Chancellor of the diocese of Ely to authorize them to make certain alterations in their parish church which involved the removal of a pew claimed by Mr. Crisp as a faculty pew, which had been occupied by his grandfather, his father, and himself for sixty years as appurtenant to their family residence. The Chancellor of the diocese of Ely held that the evidence produced by Mr. Crisp was insufficient to establish it as a faculty pew and condemned him in costs.

(1) (1752) 1 Wils. 326. (2) (1664) 1 Sid. 201, 203.
(3) (1876) 2 P. D. 15.

1908

CLAVERLEY (VICAR, &c.) v. CLAVERLEY (PARISHIONERS, &c.). CLAVERLEY (CHURCHWARDENS) v. CLAVERLEY (VICAR, &c.). GATACRE AND LEGH v. CLAVERLEY (VICAR, &c.).

Dr. Tristram.

Against this decision Mr. Crisp appealed to the Court of Arches, and Lord Penzance affirmed the judgment of the Court below as to its not being proved to be a faculty pew, but said: "But before I part with the case I would say first, as to the matter of costs, I do not think it is an unreasonable effort on Mr. Crisp's part to have endeavoured to sustain this right, which was a quasi right, and one with an enjoyment which those who had gone before him had possessed. I do not think it is unreasonable that he should have litigated his right to appeal; therefore I do not wish to condemn him in costs. But I think, also, I ought to express the opinion, that the churchwardens ought to give Mr. Crisp three or four sittings, whatever is the number as near as may be, in the part of the church where the pew has been, in which he was accustomed to sit: and I would call particular attention to what Sir John Nicholl says about the displacing of people: 'A possessory right is not good against the churchwardens and Ordinary,—they may displace and make new arrangements: but they ought not without cause to displace persons in possession'": *Pettman* v. *Bridger*. (1) His Lordship proceeded: "I do think that the possession is one that reasonably entitles Mr. Crisp, in the discretion of the churchwardens and the Ordinary, to have four seats (I think that is the number) allotted to him in as nearly as possible the same part of the church. The judgment will be affirmed, except as to costs." . . . . "The cause is to be remitted to the Court at Ely."

From the above cases and authorities it appears that from the Reformation to the present time it has been the practice of the Chancellors in the Ecclesiastical Courts, in making or in approving of an allotment of seats to parishioners, to make the allotment in general terms, so as to entitle allottees to occupy the sittings at the ordinary services of the Church on Sundays and other days, and the validity of this practice in actions in the Common Law Courts relating to such allotments has never been questioned. This practice, having now existed for upwards of three hundred years, is clearly binding on this Court, and it would not be justified in sanctioning a provision being inserted in the allotments which would exclude Mr.

(1) 1 Phillim. 316.

1908

CLAVERLEY (VICAR, &c.) *v.* CLAVERLEY (PARISHIONERS, &c.). CLAVERLEY (CHURCHWARDENS) *v.* CLAVERLEY (VICAR, &c.). GATACRE AND LEGH *v.* CLAVERLEY (VICAR, &c.).

Dr. Tristram.

Gatacre's tenants or Mrs. Legh and her tenants from their right to attend in their seats either the Sunday evening services or the services for early Communion on Sunday morning.

It appears by the cases that the vestry has nothing to do with the allotment of seats, and that an opinion expressed by them in this matter is not binding on churchwardens or the Court.

It was suggested in the evidence that churchwardens might put strangers into the allotted seats if they are not occupied by the allottees five minutes before the commencement of the service. This would be a violation of the law. The churchwardens are not entitled to put other persons into allotted seats until after the commencement of the service, but they should exercise this right in a reasonable and considerate manner.

Should a stranger be put into a seat prior to the commencement of the service and decline to leave it to enable the allottees to occupy it, he would be liable to an action at common law for disturbance of seat and to a suit in the Ecclesiastical Court for perturbation of seat.

The Court in this case will confirm the allotment of the sittings made by the churchwardens to Mrs. Legh and her tenants and to the tenants of Mr. Gatacre, coupled with a declaration that Mrs. Legh and her tenants and Mr. Gatacre's tenants are by law entitled to sit in such seats not only during the Sunday morning service, but also during the Sunday evening service and at the early Sunday morning service held for the celebration of Holy Communion, as well as at the ordinary services on Christmas Day, on Ash Wednesday and Good Friday, and at all other ordinary services held in the church as prescribed in the rubrics.

The order of the Court as to the costs of the parties relating to the question of allotment of seats is that each party pay their own costs, and that each party pay one-third of the fees due to the Court in this matter.

Solicitors for the vicar and churchwardens of Claverley: *Neve, Cresswell & Sparrow.*

Solicitors for E. L. Gatacre: *Marcy & Hemingway.*

Solicitor for E. S. Legh: *Haslewood.*

C. F. J.

JOSEPH (otherwise KING) *v.* JOSEPH.

1909
March 22.

Nullity—Jewish Marriage—Custom—Money lodged in Bank, in joint Names, in Nature of Dower—Application under Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17—Petition to restore so-called Dower—Order.

In contemplation of the marriage of the petitioner and respondent, both of whom were of the Jewish persuasion, a sum of money, provided by the intended wife or her relations, was handed to the intended husband and was lodged in a bank in their joint names, in accordance with an alleged custom in the Jewish community, the money being treated as in the nature of dower.

A decree annulling the marriage having been granted upon the wife's petition, she presented a "petition to restore dower," the application being referred to the registrar under the Married Women's Property Act, 1882, s. 17.

Upon the report of the registrar as to the facts and figures:—

The Court confirmed the report and ordered that a sum of 400*l.* standing in a bank in the joint names of the petitioner and respondent should be handed back to the petitioner for her sole and absolute use.

Motion to confirm the registrar's report upon a "petition to restore dower" bearing date November 5, 1908.

The report of the registrar was in the following terms:—

"Celia King (otherwise Joseph) *v.* Ralph Joseph.

"Application under the Married Women's Property Act, 1882, s. 17.

"The parties were married on June 4, 1907.

"The petitioner (wife) obtained a decree nisi for nullity of marriage on May 11, 1908, and this decree was made absolute on November 23, 1908.

"There appears to be a custom amongst Jews, to which race both parties belong, for the wife to bring dower.

"In this case, the wife and her relatives were well-to-do people, while the respondent was working as traveller for his father, a tin-plate worker, at wages amounting to from 1*l.* to 3*l.*, according to circumstances.

"The facts appear to be that the petitioner's relations handed to the respondent 500*l.* before marriage: 100*l.* for his own personal use and 400*l.* as joint property. The former he spent:

1909

JOSEPH v. JOSEPH.

the latter he deposited in the National Provincial Bank in the joint names of himself and the petitioner.

"Two cheques for 25*l.* each were also handed to him on the day of the wedding, as he says (and his version seems the true one), for the expenses of the honeymoon, and the money was expended in this way.

"The application before me was for return of dower, and is, in principle, akin to an application for variation of settlements.

"An order such as is asked for here can only be made by the Court or a judge: *Wood* v. *Wood and White* (1); but, as the Court will want the materials to act upon, I have thought it best to 'enquire and report as to the property' in the matters in dispute, before, instead of after, the parties go to the Court, and so save the costs of a second application.

"It is submitted that, upon the facts as proved, the 400*l.* deposited in the bank in the joint names of the petitioner and respondent should be paid to the petitioner for her sole and absolute property."

The petitioner now moved the Court to confirm the registrar's report and to order that the sum of 400*l.* mentioned in the said report and at present standing to the credit of the petitioner and respondent in their joint names at the National Provincial Bank of England, Brixton Road, London, S.W., be paid to the petitioner for her sole and absolute use.

Gwynne-Hall, for the petitioner.

The *Respondent*, in person, opposed.

BIGHAM, P., confirmed the report of the registrar and made the order asked for by the petitioner.

Solicitors for petitioner: *Jaques & Co., agents for Edwin Jaques & Sons, Birmingham.*

The respondent, in person.

(1) (1889) 14 P. D. 157.

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.
1909
March 17.

THE DRAUPNER.

Admiralty—Damage to Cargo—Bill of Lading—Charterparty — Negligence Clause—Duty of Master—Onus of Proof.

In a contract for the purchase of a parcel of wood goods, to be shipped at a foreign port and delivered c.i.f. in England, the buyer stipulated for "tonnage to be engaged on the conditions of the charterparty attached." The form of charterparty so attached contained an exception exonerating the shipowner from liability for the negligence of his servants. The charterparty made between the seller of the goods and the shipowner contained this exception, but the master of the vessel on which the goods were shipped, on the invitation of the ship's local agent, and under the impression that the negligence clause was incorporated by the words "all other conditions as per charterparty," signed a bill of lading which did not repeat the provision in favour of the shipowner.

Owing to negligent navigation there was a partial loss of the goods, and in an action of damage for short delivery brought by the buyer of the goods, as holder of the bill of lading, against the shipowner:—

Held, that the defendant shipowner was liable, for though it was the duty of the master, before signing the bill of lading, to have taken care that it contained the negligence clause, his omission to do so, and consequent want of authority, did not prevent the plaintiff from relying upon the document, as the defendant shipowner, upon whom the onus of proof lay, had failed to shew that the plaintiff, as holder of the bill of lading, had notice or knowledge of the contents of the charterparty, for the effect of the plaintiff, as buyer, sending to the seller of the goods the form of charterparty attached to the contract went no further than to advise the seller that the charterparty to be made by him as shipper of the goods with the shipowner must not contain terms less favourable to the plaintiff, as receiver of the goods under the bill of lading, than those in the form attached to the contract.

Appeal by defendants, the owners of the *Draupner*, in an action of damage for short delivery, against a decision of Bargrave Deane J. in favour of the plaintiffs, the owners of a cargo of wood goods lately laden on board the said steamship.

By a contract, in the form of the Timber Trade Federation of the United Kingdom (sleeper section), signed in London, December 7, 1906, J. W. Broitman, of Riga, through the agency of George Welch & Co., of Newcastle-on-Tyne, sold to the plaintiffs,

C. A. 1909

THE DRAUPNER.

Burt, Boulton & Haywood, Limited, of London, a parcel of wood goods, as per specification, and at prices named, "delivered to ships at Libau" according to the custom of the port, "cost, freight and insurance to Boston Dock," and "tonnage to be engaged on the conditions of the charterparty attached." The form of charterparty annexed to the contract contained the following clause: "The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and assailing thieves, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation, strikes, and/or combinations of workmen, always mutually excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner." The charterparty, dated Libau, February 2/15, 1907, made, by telegraphic authority, by the Northern Shipping Company, of which O. Eskildsen was manager, as agents on behalf of the defendants, the owners of the *Draupner*, and by J. Altschuler as agent on behalf of the shipper, J. W. Broitman, contained a similar clause; but in the bill of lading, dated Libau, March 22/7, 1907, and signed by the master, under the circumstances detailed in the judgment of Bargrave Deane J., the material words were: "dangers and accidents of the seas, rivers and navigation of whatever nature and kind they are soever excepted, unto order or to assigns he or they paying freight for the said goods seven shillings Br. str. per delivered load of 50 cubic feet English calliper measure, all other conditions as per charterparty."

On March 8, 1907, the *Draupner* stranded on the coast of Oland, and the master jettisoned part of the deck load of sleepers. On May 17 the solicitors to the plaintiff bill of lading holders wrote to the defendant shipowners in Norway that they would be held responsible for the loss due to the negligent stranding, and on May 20 the writ was issued. On May 21 the vessel arrived at Boston, and the master then obtained a general average bond. On May 25 the defendants telegraphed to the master that "solicitors for cargo threaten arrest *Draupner* on account of negligent stranding, maintain bill of lading contains no negligence clause. Is this possible?" To which the reply was, "Bill of lading contains no negligence clause, but freight

and all other conditions as per charterparty. . . . ." On the same day the plaintiffs' solicitors wrote to the defendants in Norway, ". . . . We are concerned in this matter on behalf of the B/L holder which contains no negligence clause, and our Courts long since decided that a mere reference to the C/P in the B/L does not incorporate the negligence clause. Our clients have therefore no alternative but to proceed against the steamer to recover the damages they have sustained by the negligence of those in charge of the vessel . . . . we shall have no alternative but to arrest the steamer. . . . ." In reply to this letter the defendant owners of the vessel, on May 27, telegraphed, "B/L contains dangers accidents of seas rivers and navigation of whatever nature and kind soever excepted," and on same day wrote, ". . . . the following clause is inserted that 'freight and all other conditions as per charterparty' and when the charterparty contains full negligence clause excusing the owners from any responsibility we may find that you are in no way entitled to enforce any claim against the ship. . . . ." On June 19 the defendant shipowners wrote from Bergen, Norway, to Alfred H. Read, Boston, England, who was acting on behalf of the defendant shipowners, the charterers, and the plaintiff holders of the bill of lading, ". . . . we note from the account that an amount 181*l.* 0*s.* 10*d.* (221*l.* 17*s.* 5*d.*, less discharging 40*l.* 16*s.* 7*d.*) is due to us as balance of freight. This amount you must collect from the receivers; please take 91*l.* 10*s.* 10*d.* to settle your account, and kindly remit us the balance. The amount of short delivered cargo will be made good in the general average, when it is legally adjusted, so we find it unnecessary to pay anything of this amount, because a much larger amount is already due to us from the cargo as its contribution to the average. . . . ."

By their statement of claim the plaintiffs alleged that: 1. On or about March 22, 1907, 12,176 fir sleepers were shipped on board the steamship *Draupner* at Libau, in the empire of Russia, for carriage to Boston, Lincolnshire. 2. The master of the *Draupner* signed bills of lading for the said sleepers whereby he undertook to deliver the same at Boston Dock to order. 3. The plaintiffs at the time of the short

C. A. 1909

THE DRAUPNER.

delivery hereinafter mentioned and thenceforward to the commencement of this suit were the owners of the said sleepers and the holders for value of the said bills of lading. 4. The *Draupner* having arrived at Boston, the plaintiffs caused the said bills of lading to be presented to the master, but the cargo delivered to the plaintiffs was much short of the quantity named in the bills of lading, and the plaintiffs have been and are unable to obtain delivery of the sleepers to which they are entitled under the said bills of lading, whereby they have suffered damage.

Then followed particulars of the 1112 sleepers which had formed part of the deck load and which had been jettisoned.

By their amended defence the defendants admitted that "the loss of the said sleepers was caused by neglect default or error in judgment of the master mariners or other servants of the owners of the *Draupner* . . . ."; and alleged that "5. During the said voyage by perils of the sea the *Draupner* stranded on March 8, 1907, on the coast of Oland and ship and cargo were in great and imminent peril and for the safety of ship and cargo and the lives of those on board the master jettisoned part of the deck load sleepers which is the loss complained of and the defendants are not liable therefor. 6. The defendants further say that the said sleepers were shipped on the *Draupner* under and in pursuance of a charterparty dated February 15, 1907, made by J. W. Broitman as agent and on behalf of the plaintiffs to be carried on the terms and conditions therein contained or in the alternative that the bills of lading for the said sleepers were intended to incorporate and in fact incorporated the terms and conditions of the said charterparty of which the plaintiffs had notice when they became holders of the said bills of lading or owners of the said sleepers. 7. By the terms of the said bills of lading and charterparty the following perils were excepted namely dangers and accidents of the seas and navigation and perils of the sea stranding and accidents of navigation even when occasioned by negligence default or error in judgment of the master mariners or other servants of the shipowner and the defendants will rely on the said exceptions. 8. In the alternative if the said sleepers were carried under the bills of lading and the bills of lading did not incorporate the exceptions

of the charterparty the bills of lading were as plaintiffs at all times well knew signed by the master without the authority of the defendants and are not binding on the defendants."

The action was tried on July 6, 1908, and on July 24 the following judgment was delivered by—

BARGRAVE DEANE J. This is an action, brought by the owners of a cargo of wood, which was shipped on board the steamship *Draupner* at Libau, in Russia, and was to be delivered at Boston in Lincolnshire. The action is brought to recover the value of a portion of the cargo which was not delivered. The *Draupner* having shipped that cargo, the captain gave a bill of lading for it. The vessel was stranded on the island of Oland in the Baltic Sea, and for the purpose of getting the ship off part of that wood cargo had to be jettisoned, and it was lost and could not be delivered. The defendants to the action say this: It is quite true that the vessel was stranded and the cargo was jettisoned, but it was done for the purpose of the general salving of the ship and the cargo, and there ought to be a general average payment made in respect of that part of the cargo, and they say that, by the terms of the charterparty, the negligence of the mariners shall be excepted.

It is admitted that this vessel was stranded through the negligence of those on board of her, and the material fact for me is this, namely, there being this clause in the charterparty, on looking at the bill of lading we find that there is no such clause. The bill of lading says this: "Freight for the said goods 7*s.* sterling per delivered load of 50 cubic feet English calliper measure, all other conditions as per charterparty dated 2/15th February, 1907." It is admitted that that does not incorporate in the bill of lading in terms the exception in the charterparty which excepted the negligence of the officers and crew of the ship; but it is said by counsel for the defendants that the master had no authority to sign the bill of lading without there being included in it the exceptions in the charterparty, and I have to say whether or not, in the case as proved before me, the master had authority to sign that bill of lading in the terms in which it was signed.

C. A. 1909

THE DRAUPNER.

Bargrave Deane J.

The law really is pretty plain about it. There is no question. Nobody disputes the law. There is no doubt that this bill of lading in its present condition does not incorporate the particular exception in point. There is no doubt that the negligence of the master and officers and crew of the ship is no defence in the matter if the bill of lading stands. The sole question is this: Is the bill of lading to be treated as a valid and existing document? In other words, either the master was justified and had authority to sign it as it is, or else he had not, in which case it is a non-existent document. If it is a non-existent document, the parties are relegated to the position of an ordinary carrier, and the question has to be decided on quite a different ground.

The evidence in this case, upon which I base my decision, is the evidence of the master himself, and what he said was this: "I did not know anything about English law, I did not know what the English Courts had decided on that particular point as to whether the conditions in a charterparty had to be inserted in a bill of lading in order to protect my owner. What happened was this: Before I signed the bill of lading, which I had written out myself" (and which has been produced before me), "there was a consultation between two persons, Eskildsen, who was the ship's agent, and Altschuler, who represented the shippers of the cargo. They discussed something in German, which I did not understand, and, in the result, the bill of lading was handed to me by Eskildsen, the shipowners' agent, with authority to sign it as it was." The master, therefore, had authority from the ship's agent to sign this bill of lading in its present form. On the other hand, there are the innocent parties, the owners of the cargo. They are not supposed to know, or required to know, what is in the charterparty. They have only got the bill of lading, and it has been held that there is no duty thrown upon them to refer to, or to look at, the charterparty to see what the contents are.

In my opinion, in this particular case, the master received the authority of the ship's agent to sign this bill of lading in its present form. He had the authority of his owners, through their accredited agent, to sign it, and therefore the owners are responsible for the bill of lading which the captain signed. I must give

judgment in this case for the plaintiffs for the amount of the deficiency of the cargo, with costs.

C. A. 1909

THE DRAUPNER.

On appeal :—

Bailhache, K.C., and *Maurice Hill*, for the appellants (defendants), owners of the *Draupner*. The judgment in the Court below is based upon the assumption that the master "had the authority of his owners, through their accredited agent," to sign the bill of lading without the negligence clause; but the master of a ship when she has been chartered by her owners has no right to alter the charterparty or to depart from its terms. He has no authority to sign a bill of lading imposing a greater obligation upon the shipowner than the charterparty contemplated, nor can an agent in a foreign port alter a contract made by the owners of the vessel. In the words of Carver (Carriage of Goods by Sea, 3rd ed. 1900, s. 126), summarizing the result of the cases, "Neither the master nor the broker acting for the owners can vary a charterparty made by them or on their behalf. So an agent for the charterer has not authority to vary the terms of a charter which has been made, unless he has been specially instructed to do so."

In *Krüger & Co., Ld.* v. *Moel Tryvan Ship Co., Ld.* (1) the evidence on this point was very similar to that given in the present case, for there the master asked the charterer's agent whether the ordinary clause "as per charterparty" was contained in the bill of lading, and, when he ascertained that it was, he appears to have concluded that that would cover negligence and all the other exceptions in the charterparty. The President (Sir Gorell Barnes) in his judgment in the Court of Appeal (2) says: "It seems to me that in this case he (the master) had no authority to sign this bill of lading imposing a greater obligation upon the shipowner than the charterparty contemplated."

In *Grant* v. *Norway* (3) a bill of lading had been signed by the master for twelve bales of silk, none of which had ever been shipped; it was held that transferees of the bill of lading who had

(1) [1907] A. C. 272. (2) [1907] 1 K. B. 809, at p. 821.
(3) (1851) 10 C. B. 665.

C. A. 1909

THE DRAUPNER.

given value for it on the faith of the representation contained in it, had no claim against the shipowners, for the master had no authority to give a bill of lading for goods which had not been shipped.

Scrutton, K.C., and *Lewis Noad*, for the respondents (plaintiffs), owners of cargo. The appellants are bound by the bill of lading contract which the master made. They cannot, as against strangers to the charter, who have become consignees, or indorsees of the bill of lading for value, claim to set up rights under the charterparty which are inconsistent with the terms of the bill of lading, although notice of the existence of a charterparty be given by the bill of lading. The inference to be drawn from the reference to the charterparty in a bill of lading is fully dealt with in *Manchester Trust* v. *Furness* (1), where Lindley L.J. says: "We are pressed with the fact that in this case the bill of lading referred to the charterparty, and it is said that the holder of the bill of lading took it with notice of the charterparty, and with notice therefore of this contract, and with notice that the master was the servant of the charterers. That argument appears to me to be pushing the doctrine of constructive notice a great deal too far." The learned judge then refers to the cases which shew that "the effect of the reference is to incorporate so much of the charterparty as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for incorporating more than that. What is wanted in this case is to say that, by reason of the reference to the charterparty, the holder of the bill of lading and the person who takes it in the ordinary course of business are to be treated as having notice of all the contents of the charterparty. There is no doctrine that goes to anything like that extent; and as regards the extension of the equitable doctrine of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it."

It follows from the correspondence that on May 27 the defendant shipowners knew that the bill of lading did not agree

(1) [1895] 2 Q. B. 539, at p. 544.

with the charterparty on the question of negligence, and yet on June 19 they instructed their agent to collect the freight under the bill of lading. A shipowner cannot claim freight under a bill of lading and at the same time say that he will not be bound by the terms of it. In *Mercantile Bank* v. *Gladstone* (1), where a master, not knowing of the transfer of the ship to the plaintiffs, signed bills of lading "freight for the said goods free on owners' account," Bramwell B. said: "I am very clearly of opinion that they (the plaintiffs) cannot recognize the act of the captain in receiving the goods on board, and at the same time say that they will not be bound by the terms upon which he received them." [Reference was made to *Leduc* v. *Ward*. (2)]

Maurice Hill in reply. In the particular circumstances of this case the respondents (plaintiffs) cannot allege ignorance of the contents of the charterparty, for they had attached to their contract a form of charterparty which expressly excepted, in favour of the shipowner, "stranding . . . . even when occasioned by negligence . . . . of the . . . . master." The contract also provided for "payment by the buyers acceptance to sellers or agents drafts, payable in London, for the amount of each invoice, less freight, at three months' date from date of bill of lading on receipt of and in exchange for the shipping documents and approved policy of insurance." The respondents would, therefore, have had a copy of the charterparty in their possession, or in the possession of their agent, Read, as it would have come forward with the bill of lading.

KENNEDY L.J. This is an appeal from a decision of Bargrave Deane J. in favour of the respondents, and in my view the appeal ought to be dismissed; but at the same time I should not myself have concurred in that decision if I had to base it upon the same grounds as those which my brother Deane has thought sufficient in his judgment.

The action is brought by the plaintiffs, who are the owners of a cargo of wood shipped at Libau, in Russia, for delivery at Boston. Owing to the negligence, which is undisputed, of those who were navigating the ship, it met with a misfortune, which

(1) (1868) L. R. 3 Ex. 233, at p. 240. (2) (1888) 20 Q. B. D. 475.

C. A. 1909

THE DRAUPNER.

Kennedy L.J.

resulted in the loss of a portion of the cargo, and therefore, when the ship ultimately arrived, she arrived having on board only a portion of that to which the plaintiffs, the receivers of the cargo, were entitled, and the claim is for the value of that portion which was so lost. The claim is resisted upon the ground that the plaintiffs, the receivers and owners of the cargo, are not entitled to treat the bill of lading as the contract.

The bill of lading, in so far as it refers to the charterparty, contains only the ordinary term "all other conditions as per charterparty." That reference, as it has been held for more than forty years, does not incorporate, as against the person who acquires title under the bill of lading, and who is not the shipper of the goods, but who has bought from the shipper, a clause in the charterparty between the shipper and the shipowner which would relieve the shipowner from the consequences, in regard to the carriage of the goods, of the negligence of his servants.

The plaintiffs were the buyers of the goods, and the holders of the bill of lading, through their agent, when the cargo, short of that portion in respect of which the action is brought, arrived at its destination. They had bought from a Riga firm, and they had in their contract with the seller stipulated, "tonnage to be engaged on the conditions of the charterparty attached." That form of charterparty is a form which contains a stipulation exonerating the shipowners from liability for the negligence of their servants, and it would therefore have been in accordance with the plaintiffs' contract if the charterer, who was the seller of the goods to the plaintiffs, had not only made a charterparty in that form, but had caused or agreed that there should be inserted in the bill of lading a clause exonerating the shipowners from liability for the negligence of their servants. In fact, he did make, as between himself and the shipowners, a charterparty which contained an exception of negligence clause. When the cargo was shipped at a foreign port—the master being present, and one gentleman representing the shipper, and another gentleman who represented in a sense, for the purposes of what had to be done in connection with the clearance of the ship, the shipowners—by agreement between the three, and apparently on the

invitation primarily of the agent of the shipowners, the master signed a bill of lading which did not repeat the charterparty provision in favour of the shipowners with regard to the negligence of their servants. I think it is quite clear that all three thought that the reference to "all other conditions as per charterparty," which did appear in the bill of lading, would be sufficient to incorporate that exception of negligence clause which appeared in the charterparty, and I entirely agree with the argument presented by counsel for the appellants that the shipowners' agent, Mr. Eskildsen, had not, as between the shipowners and the charterer, any right to vary the terms which ought to be inserted in that bill of lading. There was no authority to do it, and, therefore, when Bargrave Deane J. holds, as he does, and bases his judgment upon holding, that the shipowners' agent authorized the master to sign the bill of lading in the form it was in I do not agree with him. Therefore, if the judgment could only be supported upon that ground, I should myself allow the appeal.

When, however, the matter comes to be considered, and as the matter, indeed, has been argued by counsel on behalf of the respondents, there is a more formidable difficulty presented to the appellants. This bill of lading, with the other documents, known usually as shipping documents, was apparently forwarded in due course to the person named Read at Boston, who represented there three parties. He represented the ship, he represented the charterer, and he represented the holder of the bill of lading, to receive the cargo when it came, and there is no doubt that at some time and in some way, which does not appear in the evidence, Read received the charterparty as well as those documents which ordinarily are called shipping documents. There is no evidence whatever to justify the suggestion of that which would, I think, have been an unusual course, that the charterparty came forward with the bill of lading, and the policy of insurance and bill drawn against the cargo. It is at least as likely, in my view, that the charterparty, which was found in Mr. Read's possession, came from either the shipowner or his agent, Eskildsen, or came forward to Read possibly from Broitman, the seller of the goods and the charterer, and who

C. A. 1909

THE DRAUPNER.

Kennedy L. J.

would naturally forward it, I should think, to his agent. There is no evidence that the charterparty came into the possession of the plaintiffs personally at any time, and no evidence that it came into the possession of Read through the plaintiffs or their agent.

It has been suggested, on behalf of the plaintiffs, that the correspondence which took place with reference to this claim, and the action of the shipowner in making his claim for freight, constituted in some sort of way a ratification of the bill of lading in the form in which it was given, so as to become an authority after the event for what the master did. In my opinion that argument of alleged ratification altogether fails.

There is, however, a general rule, as to which there is no doubt, that if a person takes a bill of lading for value, as the purchaser of goods to which that bill of lading relates, the shipowner is not entitled to go beyond the terms of that bill of lading in any relations between himself and that holder for value. That is the general rule, that while the charterparty is the contract between the charterer and the shipowner that contract is not to be read into the obligation of a receiver of goods under the bill of lading who is not the charterer, except in so far as, under the legal interpretation of the bill of lading, the terms of the charterparty are incorporated in the bill of lading. That the terms of the charterparty, exonerating the shipowner from liability for the negligence of his servants, were not incorporated in this bill of lading I have already said, and the present respondents say that the Court cannot, upon the facts of this case, hold them to be bound by the negligence clause of the charterparty, or treat the bill of lading, as against them, as a document upon which they cannot rely because it is not in accordance with the terms of the charterparty.

It is, however, urged by the appellants that the present plaintiffs had in making the contract of purchase with the charterer stipulated for a form of charterparty which would have protected the shipowner, and that, as they must be taken to have presumed that the bill of lading would be in accordance with that charterparty, they are affected with notice of the charterparty,

so that the charterparty, so far as the negligence clause is concerned, ought to be treated as binding upon them, and therefore the present claim cannot successfully be put forward. I do not think, upon the evidence before us, that anything has been proved which can be treated as creating such an obligation. So far as knowledge or constructive notice is concerned, I am not going to repeat what Lord Lindley said in the well-known passage in his judgment in *Manchester Trust* v. *Furness* (1) which has been cited to us in the argument. We do not incorporate the doctrine of constructive notice into commercial transactions of this kind, and therefore it seems to me that the question comes to this: Can what happened be imputed to the plaintiffs as actual knowledge that the bill of lading is not one which the master ought to have signed, because not in accordance with the charterparty? If that be so, of course they cannot rely upon it as against the shipowner.

Upon the whole I have come to the conclusion that that case of knowledge has not been made out. Ought the fact that a charterparty was authorized by the plaintiffs which would protect the shipowner by a negligence clause to be treated as knowledge—when the bill of lading came into his possession, or the possession of his agent, and did not contain such a clause—that that bill of lading was signed by the master and given to the shipper without the authority of the shipowner, that is to say, as knowledge that the charterparty which was actually made was a charterparty which contained a negligence clause, and therefore did not authorize a bill of lading which did not contain it? I think counsel for the respondents correctly pointed out that what would be understood commercially by the contract between the plaintiffs and the shipper, in their contract with him for the shipment, is, "You must make a charterparty which, so far as it affects me, is one which contains nothing more onerous or more disadvantageous to me than that form of charterparty which I approve, and which I bind myself to be satisfied with." If the charterer, who sold c.i.f., could contract for the carriage of the goods on different terms, not less favourable so far as the buyer was concerned, there would be no breach of contract; nor

(1) [1895] 2 Q. B. 539, at p. 545.

C. A. 1909

THE DRAUPNER.

Kennedy L.J.

is it to be taken as out of the reasonable contemplation of the parties that a contract might be made, with the shipowner's consent, waiving, in favour of the charterer, the terms appearing in the form of charterparty sanctioned by the plaintiffs as to exception of negligence.

It, therefore, seems to me that there was nothing to fix the plaintiffs or their representative with knowledge that the bill of lading did not correctly represent what the master was entitled properly to sign on behalf of the shipowner, and therefore nothing which can be held to prevent the plaintiffs relying upon the bill of lading as the contract between them and the shipowner. I do not think, upon the evidence as it stands, that there was any proof of knowledge which would affect the plaintiffs' rights and prevent the application of the general rule in favour of the indorsees being entitled to rely upon the bill of lading terms and no other. Therefore I think the appeal fails.

SIR JOHN BIGHAM, PRESIDENT. I agree. I think we are coming to a conclusion which is in accordance with the truth of the facts which are given in evidence, and with those alone we must deal.

The bill of lading in this case gives the holders a right to sue the shipowners for any loss that might be occasioned by the negligence of the master, and the only way in which the shipowners can escape that liability is by shewing first of all that the master was bound to insert in the bill of lading a clause exempting the shipowners from the consequences of his negligence, and secondly by shewing that the plaintiffs had knowledge of that fact. That the master was bound to insert such a clause in the bill of lading is in my opinion quite clear; but there remains the other question, which is in my opinion the important question. Is it proved that the plaintiffs had knowledge of that term in the charterparty? The proof of that rests, of course, with the defendants. They allege notice and knowledge, and they must prove it, and the question is: Have they proved it? What they have done is this. They have shewn that the plaintiffs had given instructions to have a charterparty made in which the negligence clause should be included, but they have not shewn that the plaintiffs ever knew that such a

C. A. 1909

THE DRAUPNER.

The President.

charterparty had in fact been made. They have, therefore, in my opinion, failed to bring home to the plaintiffs that knowledge which it was incumbent upon them to prove. I think it not at all improbable that the plaintiffs well knew that this charterparty had been made, and well knew what was in it, but I do not think we are entitled to speculate upon that. We are bound to take the evidence as we find it, and upon the evidence as I find it I am unable to say that the defendants have discharged the onus upon them of fixing the plaintiffs with knowledge of the contents of the charterparty.

Joyce J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellants (defendants), owners of the *Draupner*: *Thomas Cooper & Co.*

Solicitors for respondents (plaintiffs), owners of cargo: *William A. Crump & Son.*

T. L. M.

In the Estate of ELLEN SAKER.

1909 *May* 5.

Administration de bonis non—Original Administrator believed to be dead—Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 74.

The original administrator of a deceased intestate could not be found and was believed to be dead. Additional assets having been discovered due and payable to the estate of the intestate, the Court, by virtue of s. 74 of the Probate Act, 1857, granted administration de bonis non to one of the next of kin, upon her affidavit that she believed the original administrator (her brother) to be dead or beyond the seas.

Motion on behalf of Mabel May Stuchbery, daughter of Ellen Saker, deceased, who died in 1886, a widow and intestate, for a supplementary grant of letters of administration de bonis non.

On September 28, 1887, Percy Charles Saker, the son of the deceased, took a grant of letters of administration to her estate.

Ellen Saker, the deceased, was one of the next of kin of Edgar Francis Carter, who died in the year 1884, and whose estate was now being administered in the Chancery Division, the

1909

SAKER, IN THE ESTATE OF.

proceedings having been commenced as far back as 1897. Delay arose in those proceedings in consequence of difficulty in ascertaining the next of kin of Edgar Francis Carter. It was stated that terms of settlement had been arrived at in the Chancery proceedings, but that it was impossible to carry the same into effect without having the legal personal representative before the Court.

Percy Charles Saker, the administrator, had not been heard of for upwards of twelve years, and advertisements which had been inserted in various newspapers had not resulted in the discovery of his whereabouts nor in clearing up the doubt which existed as to whether he were alive or dead.

It was stated in an affidavit by the solicitor having the conduct of the Chancery proceedings that Percy Charles Saker, the administrator, was believed to be either dead or beyond the seas.

Frampton, for the applicant. There does not appear to be any reported case covering this one. The applicant would be prepared, if the Court should think fit, to pay the share of the missing man into Court.

BARGRAVE DEANE J. The applicant must make an affidavit, corroborated by a second member of the family, deposing to belief in the death, and you must bring the share of the missing man into Court in the Chancery proceedings. I think I have power to make such an order. (1)

Solicitor for applicant: *W. Gipps Kent.*

(1) The order was drawn up in the following terms:—

"On the 3rd day of May 1909.

"In the estate of Ellen Saker deceased.

"On reading the statement filed on behalf of the applicant and the affidavits of Mabel May Stuchbery sworn the 24th April 1909 and James Parker Ayres sworn the 30th April 1909 and on hearing counsel thereon it is ordered, that, subject to the applicant swearing that she verily believes that Percy Charles Saker the administrator of the deceased is dead, letters of administration of the unadministered personal estate of Ellen Saker, deceased, be granted to Mabel May Stuchbery, if entitled thereto, and, that

the share of the said Percy Charles Saker be brought into Court in the Chancery proceedings for the administration of the estate of Edgar Francis Carter who died in the year 1884.

"W. INDERWICK, Registrar."

The statute 38 Geo. 3, c. 87 (usually called Mr. Simeon's Act), after reciting that the laws then existing were not sufficient to enforce a speedy distribution of the assets of deceased persons in cases where the executor to whom probate of the will has been granted is out of the jurisdiction of His Majesty's Courts of Law and Equity, proceeded to enact as follows:— Sect. 1: "That at the expiration of twelve calendar months from the death of any testator if the executors or executor to whom probate of the will shall have been granted are or is then residing out of the jurisdiction of His Majesty's Courts of Law and Equity, it shall be lawful for the Ecclesiastical Court, which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee grounded on the affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned; which administration shall be written or printed upon paper or parchment, stamped only with one five shilling stamp, and shall pay no further or other duty to His Majesty, his heirs or successors."

The Court of Probate Act, 1857 (20 & 21 Vict. c. 77), extended the application of the foregoing statute to absent administrators. Sect. 74: "The provisions of an Act passed in the thirty-eighth year of his late Majesty King George the Third, chapter 87, shall apply (in like manner) to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of Her Majesty's Courts of Law and Equity."

And by the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 18, the foregoing provisions were extended to all executors and administrators residing out of the jurisdiction of Her Majesty's Courts of Law and Equity.

H. D. G.

1909
April 26.

EL ARGENTINO.

Admiralty—Ship—Mortgage—Freight—Bunker Coal.

Bunker coal was supplied in this country to a British ship on the personal credit of her owners, a limited company registered and having its office in England. The vessel left in ballast for the River Plate, and, her owners having become involved in financial difficulties, mortgagees took constructive possession of her when about to return with a valuable cargo. During the homeward voyage a quantity of the coal was consumed, and, on the arrival of the vessel in this country, the freight was collected by a receiver appointed by the Court, the net proceeds, less necessary disbursements, being paid into court. On the application of the mortgagees for payment out to them of the freight in court, the vendor of the coal claimed a deduction in his favour on the ground that the coal had been used in earning the freight:—

Held, that the mortgagees in possession were entitled to an order for payment out to them of the balance of the freight in court without any deduction on account of the coal consumed, for, though the coal was used in earning the freight, it was coal which had been sold to and was the property of the mortgagors, and, therefore, the claimant, the unpaid vendor, had no interest in the coal or in the freight.

Motion by Barclay & Co., Limited, mortgagees in possession of the steamship *El Argentino*, in objection to the report of the registrar holding that the claimants, Kaye, Son & Co., Limited, were entitled, out of a fund in Court representing freight, to be paid for bunker coal supplied to the owners of the steamship.

In 1906 the Anglo-Argentine Steam Shipping Company, Limited, was formed to carry on the transport of chilled and frozen meat from the Argentine, and, for that purpose, to take over from Wincott, Cooper & Co. certain contracts for freight, and the benefit of two agreements with Sir James Laing & Sons, Limited, of Sunderland, for the building of two vessels, *La Blanca* and *El Argentino*, estimated to cost 100,000*l.* each, of which 20 per cent. was to be paid by instalments down to the date of delivery, and the balance by acceptances at six months, renewable from time to time, but to be paid off at the rate of 10,000*l.* per annum with interest, the builders having collateral security in the shape of first mortgages on the vessels together with insurance policies. In February, 1907, *El Argentino* was delivered by Sir James Laing & Sons, and, on November 21, the claimants,

1909

EL ARGENTINO.

Kaye, Son & Co., Limited, of London, sold to Wincott, Cooper & Co., who were acting as managing owners for the Anglo-Argentine Company, 2466 tons 9 cwt. of bunker coal for the steamship *El Argentino*, the price, at 15*s.* 6*d.* per ton, amounting to 1911*l.* 10*s.* On December 14, this coal was put on board the vessel at Barry. On January 9, 1908, the vessel arrived at Montevideo. On January 13, the time for payment for the coals expired, but the Anglo-Argentine Company had become involved in financial difficulties. On February 8, Sir James Laing & Sons suspended payment, and on the same day that firm took constructive possession of *El Argentino*, on behalf of Barclay & Co., Limited, who had discounted the acceptances of the Anglo-Argentine Company, in respect of the building contract, to the extent of 121,000*l.*, and who, as holders of the bills, claimed the benefit of the builders' mortgage under the rule in *Ex parte Waring*. (1) On February 17, a resolution was passed for the voluntary liquidation of Sir James Laing & Sons, Limited, and H. S. Squance was appointed liquidator. At the end of February the vessel (*El Argentino*) arrived in the Thames from the River Plate with a cargo of frozen meat.

The following correspondence was taken as part of the agreed facts. Under date of February 10, the solicitors for the claimants wrote to Sir James Laing & Sons: "We understand that you are the first mortgagees of this vessel, and that you either have taken or propose to take possession of her. We think it right to inform you that our clients, Messrs. Kaye, Son & Co., Limited, have claims against the vessel in respect of coals supplied to her when she left this country. The claim amounts to 1911*l.* 10*s.* Our clients claim a right to be paid the amount or at all events the value of the coals used on the way home, and out of the freight which the vessel will earn on that voyage, and we shall be glad to hear from you that you will take the necessary steps to protect our clients' claim so as to obviate any proceedings being taken to enforce it." On the following day Sir James Laing & Sons replied: ". . . . We will be glad if you will refer us to any authority under which your clients are entitled to a preference over our mortgage for their claim of 1911*l.* 10*s.* With

(1) (1815) 19 Ves. 345.

1909

EL ARGENTINO.

regard to the coal consumed on the homeward voyage, this, no doubt, has been supplied to the ship on the credit of the Anglo-Argentine Company, and we are advised that we are entitled to use all coal and stores actually on board the vessel at the time we take possession. . . . ." On February 12 the solicitors for the claimants wrote: ". . . . We do not know that we can refer you to any actual decision to the effect that a mortgagee must pay out of any freight he collects the costs and expenses of the voyage in respect of which the freight is collected; but it seems to us that on the most ordinary principles the person who takes the benefit of the results of a voyage must pay the expenses the expenditure of which has brought about those results. . . . ." On February 13 Sir James Laing & Sons replied that ". . . . we cannot . . . . admit your view of the matter."

On February 17, an ex parte application, under s. 30 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and in the matter of Sir James Laing & Sons, Limited, was made by Barclay & Co., Limited, and, upon reading an affidavit of a member of the firm of their solicitors, Bargrave Deane J. granted an interim injunction restraining the owners or mortgagees of the steamships *La Blanca* or *El Argentino*, or any other person or persons, from dealing with the said vessels or with the shares thereof until further order of the Court.

On February 20, the solicitors for H. S. Squance, liquidator of Sir James Laing & Sons, Limited, wrote to the solicitors for the claimants in reply to a further letter of theirs: "Can you refer us to any authority under which our client would be justified in paying Messrs. Kaye's claim under the circumstances you mention? If you can do so our client is quite prepared to consider the matter favourably. Further complications, however, have arisen in respect of orders which have been obtained by the consignees of the cargoes in view of several conflicting claims, ... You will thus see that our client is not in a position to recognize any claims excepting those which are actually liens or charges upon the vessels." To this letter the reply was, so far as material, "It seems to us that, as the freight could not be earned without the use of the coals which were supplied by our clients, at all events, the value of the coals used

subsequent to the mortgagees taking possession ought to be paid for."

On February 26, with a view to disposing of the vessels by sale and payment into Court of the proceeds to a separate account, and upon hearing counsel for the liquidator of the affairs of Sir James Laing & Sons, Limited, for the receiver appointed in an action in the Chancery Division by holders of debentures charging the property of the same firm, for Barclay & Co., Limited, and for the Anglo-Argentine Company, Limited, Bargrave Deane J. dissolved the injunction restraining the sale or dealing with the vessels, and in respect of the freight made an order in the following terms, namely :—

"As to the steamship *La Blanca* . . . .

"As to the steamship *El Argentino*.

"(*a*) That Messrs. Birt, Potter & Hughes do act as ship's agents in connection with the completion of the homeward voyage and the discharge of the cargo.

"(*b*) That they do collect the freights and pay all proper disbursements, including their own proper remuneration, and thereupon pay the balance of such freight into this Court,

"(*c*) and that they use all reasonable care and diligence to keep the expenses down to the lowest possible amount consistent with the due carrying out of the above purposes . . . ."

On January 18, 1909, upon the application of counsel for Barclay & Co., Limited, counsel and solicitors for all parties interested being present and consenting, Bargrave Deane J. ordered that the balance of 8936*l.* 11*s.* 7*d.* remaining in Court to the credit of the account of the steamships *La Blanca* and *El Argentino* be paid out to Barclay & Co., Limited, less the sum of 2500*l.* to be retained in respect of an amount, stated to be 1911*l.* 10*s.*, claimed to be due to Kaye, Son & Co., Limited, and the learned judge further ordered that the claim on behalf of Kaye, Son & Co., Limited, be referred to and dealt with by the registrar, assisted, if necessary, by a merchant or merchants, to report as to the same being chargeable against the fund in Court or otherwise, and if necessary to assess the amount thereof.

1909

EL ARGENTINO.

On February 24, the registrar by his report stated that "the claimants contend that the amount of their claim should have been paid out of the gross freight, and that that not having been done, they are entitled to recover it out of the fund in Court" representing the freight, and that "the question resolved itself into one of law," namely, "Have the mortgagees in possession a right to recover the freight without paying for the supplies to the vessel necessary for the earning of such freight, it being admitted that those who supplied the articles had no maritime lien? It is undeniable that a solvent shipowner would deduct from the freight the amount of such disbursements as these before arriving at the net freight. In my opinion the claimants are entitled to be paid out of the freight the sum of 1911*l.* 10*s.* on the principle that, having received the benefit of this expenditure in the shape of the freight becoming due by the completion of the voyage—and I regard the voyages from and to the United Kingdom as one adventure—they (the mortgagees) must pay it. This seems to me to be the principle laid down by the House of Lords in *Bristow* v. *Whitmore*. (1) It was said that this decision was not to be found approved in any subsequent case. It appears, however, to me to be so clear and equitable a proposition as not to need subsequent approval; but I think also that the same principle is to be found in *Tanner* v. *Phillips* (2), in which *Bristow* v. *Whitmore* (1) was cited, where it was admitted that the charterers were entitled as against mortgagees in possession to deduct from the gross freight advances on account of freight as stipulated in the charterparty, but not money advanced merely as loans and not referred to in the charterparty. See also Carver (Carriage of Goods by Sea, 3rd ed., 1900), s. 590, as to the right of a mortgagee of shares of a part owner. Several cases were cited by counsel for Messrs. Barclay, but they do not appear to alter the main principle, and are clearly distinguishable from the present case. Having come to this conclusion, it is unnecessary to refer further to the arguments of counsel, though it is perhaps desirable that I should state that in my view coals cannot be regarded as part of the equipment of a ship, so as to bring s. 4 of the Admiralty Court Act, 1861, into force."

(1) (1861) 9 H. L. C. 391. (2) (1872) 42 L. J. (Ch.) 125.

1909

EL ARGENTINO.

At the hearing, before the President (Sir John Bigham), on April 26, in objection to this report, it was admitted by the claimants, Kaye, Son & Co., Limited, for the purposes of the motion—

(*a*) that they had sold the coal to the Anglo-Argentine Company, Limited, the owners of *El Argentino*, on their personal credit only;

(*b*) that they had no possessory or maritime lien on the ship or freight, and no assignment of the freight;

(*c*) that *El Argentino* was a British ship and the owners were a limited company, registered and having its office in England;

(*d*) that Barclay & Co., Limited, were entitled to the benefit of the mortgage on the ship and of the possession taken by the mortgagees before the freight was due or paid.

Scrutton, K.C., and *R. A. Wright* (*Leslie Scott* with them), for the mortgagees, Barclay & Co., Limited. The registrar was wrong in holding that the claimants had a right to have the personal contract debt of the Anglo-Argentine Company in respect of the bunker coal discharged out of the freight which was collected by order of the Court on behalf of the parties entitled thereto, namely, Barclay & Co., Limited, who admittedly have all the rights of Sir James Laing & Sons, Limited, as mortgagees, and who since February 8, 1908, have been in constructive possession of the vessel.

A mortgagee on taking possession becomes owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight which, by contract or otherwise, is lawfully payable: *Keith* v. *Burrows*. (1) It is true that, where a ship is mortgaged only, the mortgagee does not thereby acquire the right to accruing freight, for he has not taken possession, the distinction being that a sale carries the right to all accruing freight from the time of assignment, but a mortgage only from the time of taking possession: see Carver's Carriage of Goods by Sea, 3rd ed. (1900), s. 592. Here Barclay & Co. are mortgagees in possession, and, as such, are entitled to all the accruing freight, that is, to the sum in Court

(1) (1877) L. R. 2 App. Cas. 636.

1909

EL ARGENTINO.

representing the freight, without any liability to pay for the bunker coal.

In *The Troubadour* (1) Dr. Lushington laid down that a "mortgagee in possession . . . . would not be liable for necessaries supplied to the ship, unless the master, in ordering the necessaries, was acting as the agent of such mortgagee," and the learned judge refers to *The Pacific* (2), where the order of priority between the mortgagee and the material man is explained with reference to the Admiralty Court Acts. See also *The Two Ellens.* (3) The registrar, in his report, refers to *Tanner* v. *Phillips* (4), but that case does not help the claimants, for there the charterparty had stipulated that the charterers should make advances, not exceeding 150*l.*, on account of freight, and that the balance of the freight should be paid on delivery. The charterer actually made advances to the master beyond the 150*l.*, both at the loading port and at the port of discharge, for the ship's purposes, before they received notice of the mortgage; but it was held that the whole freight was payable to the mortgagee on his taking possession without deduction of anything except the 150*l.* In that case *Bristow* v. *Whitmore* (5), also relied upon by the registrar, was cited; but Lord Wensleydale and Lord Chelmsford dissented from that judgment, and the equitable doctrine there propounded has not, with regard to shipping, met with approval. In the result the decision amounts to no more than an illustration of the law relating to principal and agent, for it shews that if the owner, or his mortgagee, ratifies the act of the master, he must ratify the whole of it. The registrar further refers to s. 590 of Carver's Carriage of Goods by Sea, 3rd ed., where *Green* v. *Briggs* (6) and *Alexander* v. *Simms* (7) are cited, but they do not affect the present question, for the first only defines, in respect of earnings, the position of several owners of a ship according as they are partners or independent part owners, and the second shews that a mortgagee of the shares of a part owner stands in the position of the

(1) (1866) L. R. 1 A. & E. 302, at p. 304.
(2) (1864) Br. & L. 243.
(3) (1872) L. R. 4 P. C. 161.
(4) 42 L. J. (Ch.) 125.
(5) 9 H. L. C. 391.
(6) (1848) 17 L. J. (Ch.) 323.
(7) (1854) 23 L. J. (Ch.) 721.

mortgagor towards the other part owners, in regard to the division of the freight, and can only claim his share subject to the deduction of expenses.

Laing, K.C., and *C. Robertson Dunlop*, for the claimants, Kaye, Son & Co., Limited. The bunker coal was put on board the vessel at Barry for the round voyage to Buenos Aires and back. On the way out it served in part as ballast, and on February 8, 1908, when Barclay & Co., Limited, took constructive possession under the builders' mortgage, the vessel had not left Montevideo and had a large quantity of this coal on board. The mortgagees, with the permission of the Court, brought the vessel home for their own benefit as owners with the cargo of frozen meat which it was the object of the adventure to fetch from South America, and for this purpose made use of the coal. Admitting that the mortgagees, on taking possession, became entitled to all the freight that the ship was in process of earning, still, as the mortgagees cannot get the freight out of Court without an order, the Court will not leave the supplier of the coal to look to the bankrupt owners of *El Argentino*, but will hold that the mortgagees are only entitled to the balance of the gross freight remaining after payment of the crew's wages, towage, pilotage, dock dues, cost of discharging the cargo, and other proper expenses, such as the cost of coal consumed to earn the freight; that is to say, the receiver ought to have allowed this claim along with the others before paying the freight into Court, but not having done so, the Court will now correct the omission.

In *The Feronia* (1) Sir Robert Phillimore held that the principle of the decision of the House of Lords in *Bristow* v. *Whitmore* (2) was applicable, and added, "It is a strong authority for saying that the mortgagee in possession, or the owner, ought not to be allowed to possess himself of this freight until the master has been indemnified for the labour and disbursements by which that freight was produced." In *The Red Rose* (3) the authority of *Bristow* v. *Whitmore* (2) is again invoked in respect of the deduction of expenses necessary to enable the ship to earn her

(1) (1868) L. R. 2 A. & E. 65, at p. 77.

(2) 9 H. L. C. 391.

(3) (1868) L. R. 2 A. & E. 80, at pp. 82, 85, 86.

1909

EL ARGENTINO.

freight, and Mr. H. C. Rothery, the then registrar, in his report exhaustively examines the reasoning in that case, and says of it, "It passed successively through three courts, and is, I believe, a case of very high authority." See also the reference to the same case in *The Orienta*. (1)

The PRESIDENT (SIR JOHN BIGHAM). If I had any doubt about this case I should take time to consider my judgment, but I really have no doubt at all.

The coal in question, when it was sold by Messrs. Kaye, Son and Co. to the owners of *El Argentino*, that is, the mortgagors, became the property of the mortgagors, and Messrs. Kaye retained no interest in it of any kind whatever. The result is that though part of the coal was undoubtedly used on the voyage from Montevideo to this country, for the purpose of earning the freight payable in respect of that voyage, it was coal consumed which belonged to the mortgagors. It was not coal consumed belonging to Messrs. Kaye, or in which Messrs. Kaye had any interest whatever. Messrs. Kaye, Son and Co. are, therefore, in my opinion, not in a position to say, and cannot be allowed to say, that the freight has been earned in any sense at their expense. Nothing of theirs, neither labour nor material, was used for the purpose of earning the freight, and if nothing of theirs was used for the purpose of earning the freight, they cannot by any possibility have any interest in the freight earned.

I therefore think that the report of the registrar cannot be supported, and that the money in Court, so far as it represents the freight, must be paid out to the mortgagees.

Solicitors for mortgagees: *Cattarns & Cattarns.*
Solicitors for claimants: *Thomas Cooper & Co.*

(1) [1894] P. 271, at p. 279; affirmed [1895] P. 49.

T. L. M.

[IN THE CONSISTORY COURT OF LONDON.]

1909
March 19.

THE VICAR AND CHURCHWARDENS OF THE PARISH OF ST. PAUL, BOW COMMON *v.* THE INHABITANTS OF THE SAME.

Ecclesiastical Law—Faculty—Faculty for the Erection of Rood Beam surmounted by Crucifix with Figures of the Virgin Mary and St. John refused —Rood—Illegal Church Ornament—Ornaments Rubric—2 *& 3 Edw.* 6, *c.* 1.

A rood with the accompanying figures of the Virgin Mary and St. John erected on a beam surmounting the chancel screen is not a lawful church ornament in churches of the Church of England.

The vicar and churchwardens of a parish church in the diocese of London petitioned the Ordinary to authorize by faculty the erection of a beam across the entrance to the chancel of their parish church bearing the following inscription in Latin on its face, "O Lord God, Lamb of God, Son of the Father, that takest away the sins of the world," and surmounted by, on a central cross, the figure of our Lord, "crowned and reigning on the tree," and towards the ends of the beam on the one side the figure of the Virgin Mary and on the other side the figure of St. John; the crucifix and the other figures to be carved in wood, the height of the crucifix to be 13 ft. 10 in., and the two figures of the Virgin Mary and St. John to be each 3 ft. 6 in. high and to be raised above the level of the beam on brackets or pedestals:—

Held, that the faculty petitioned for must be refused, as the rood beam surmounted as proposed by the crucifix and the accompanying figures of the Virgin Mary and St. John was an illegal church ornament forbidden in churches of the Church of England.

This was a cause of faculty instituted on behalf of the Reverend William Forster, the vicar, and John McDonald and M. P. Conway, the churchwardens of the parish of St. Paul, Bow Common, in the diocese of London and county of Middlesex, for the purpose of obtaining a faculty for certain alterations in the parish church described in the petition in the suit and shewn on a plan annexed thereto, the material allegations in such petition being as follows:

"That it being considered desirable to make certain improvements in the church of St. Paul, Bow Common, a meeting in vestry duly convened for considering the same was held, at which it was resolved that the alterations shewn on the plan

1909

ST. PAUL, BOW COMMON (VICAR AND CHURCH-WARDENS) v. INHABITANTS OF THE SAME.

annexed to the resolution come to at the vestry should be carried out.

"That the proposed alterations as shewn by the said plan are as follows: to erect a beam across the entrance to the chancel, enriched with gilt cresting and bearing the following inscription on its face and scroll, 'O Lord God, Lamb of God, Son of the Father, that takest away the sins of the world,' made out to each end with vine foliation in gold on green ground; on a central cross the figure of our Lord (Archbishop Benson's rendering), 'crowned and reigning on the tree,' and idealized figures of the Virgin and St. John, the latter with his emblem, carved in pear wood on gilt and colour work.

"That the estimated cost of the alterations will be about 270*l*."

The petition concluded with a prayer that the Court would be pleased to decree a licence or faculty authorizing such alterations to be carried into effect.

1909. Jan. 14. On this day the cause came on to be heard before the Chancellor of the diocese of London (Dr. Tristram, K.C.).

The vicar in person moved the faculty and gave evidence in support of the petition, and evidence was also given in support of the petition by an architect who had prepared the plan, shewing the alterations, and a coloured elevation or representation of what was proposed to be erected. Such coloured elevation or representation was put in evidence on behalf of the petitioners, and from it it appeared that the inscription, "O Lord God, Lamb of God, Son of the Father, that takest away the sins of the world," proposed to be placed on the face of the rood beam was in Latin; that the space below the rood beam and across the entrance to the chancel was to be filled with a chancel screen between the chancel and the nave of the church; and that the figures of the Virgin Mary and St. John were to be placed on the sides of the central crucifix, the figure of the Virgin Mary on one side and the figure of St. John on the other, each of the two figures being placed towards one end of the rood beam, raised above its level on a bracket or pedestal.

The result of the evidence given by the above-mentioned witnesses is stated in the judgment.

Cur. adv. vult.

1999. March 19. DR. TRISTRAM. In this case the Reverend William Forster, the vicar of the parish of St. Paul, Bow Common, and both the churchwardens of the parish have applied to the Court by petition to grant a faculty authorizing them to make the following alterations in the parish church, namely: [Dr. Tristram read the description of the proposed alterations as set out in the petition, and continued:—] On January 14, 1909, the vicar in person moved the Court to grant a faculty authorizing the above alterations in the church to be carried into effect.

In support of the application the vicar gave the following evidence, namely, that he had been vicar for eight years, and previously thereto assistant curate of the parish; that the population of the parish is about 14,000, that there was accommodation in the parish church for a congregation of about 800, and that at the morning and evening services on Sundays it amounted to about 400, including children; and that at a vestry meeting duly convened for the purpose of considering the above application, and held on November 11, 1908, at which from twenty to thirty parishioners were present, a resolution was passed unanimously to accept the offer of a rood beam according to the above-mentioned description given in memory of the late Mrs. Ellen Geoffrey by members of her family, who were formerly resident in the parish. The vicar also stated that the expense of the alterations, which would amount to 270*l.*, would be paid for by members of the family of Mrs. Geoffrey. The architect of the church said that he had prepared the original plan of the chancel screen, and of the figures which were to surmount it.

The width of the screen was 30 ft.; the total height of the crucifix, which surmounted the screen, was 13 ft. 10 in. The front of the crucifix was 7 ft. 3 in. in width; the figure of the Virgin Mary was 3 ft. 6 in. in height; the figure of St. John was the same in height. The figures from the upper

1909

ST. PAUL, BOW COMMON (VICAR AND CHURCHWARDENS) v. INHABITANTS OF THE SAME.

Dr. Tristram.

part of the screen were 14 ft. in height. The crucifix is to be erected in plain wood. The figure of the crucifix projects about 15 inches. The other two figures of the Virgin Mary and St. John also project 15 inches.

The church was built in 1868. About ten years after it was built a tie rod, extending from wall to wall at the entrance to the chancel, was placed to support it. The proposed screen, being from wall to wall, will act as a further security to it.

Since the hearing of the case I have inspected the church in the presence of the vicar. He pointed out to me that one of the pillars of the arch to the chancel was out of level owing to a recent drainage scheme, which had necessitated the placing of a tie rod from wall to wall. At the conclusion of his evidence I put the question to him whether he applied to me to sanction by faculty the representation of our Lord on the cross, with the figures of the Virgin Mary and St. John, as an architectural ornament, and he replied in the affirmative.

In ecclesiastical law there are two classes of ornaments—articles of decoration or embellishment, and ornaments for use in the services of the Church.

On this point, the following passages in the judgment of the Judicial Committee of the Privy Council in the case of *Westerton* v. *Liddell* (1) are material. "In dealing," their Lordships said, "with this question it is necessary to remember that there were many crosses, some with, some without, the image of our Saviour, in use in the Roman Catholic ritual; . . . . and others not used in the services, but set up as architectural decoration of Churches; and the question is whether the Rubric applies to the latter class. The Rubric is in these words: 'And here it is to be noted that such ornaments of the Church and of the Ministers thereof, at all times of their Ministration shall be retained, and be in use, as were in this Church of England, by authority of Parliament in the second year of the reign of King Edward the Sixth. . . . ."

"Their Lordships, after much consideration, are satisfied that the construction of this rubric which they suggested at the hearing of the case is its true meaning, and that the word

(1) (1857) Moore's Special Report, pp. 155 to 159.

1909

ST. PAUL, BOW COMMON (VICAR AND CHURCH-WARDENS) v. INHABITANTS OF THE SAME.

Dr. Tristram.

'ornaments' applies, and in this rubric is confined to those articles the use of which in the Services and Ministrations of the Church is prescribed by the Prayer Book of Edward the Sixth.

"The term 'ornaments' in ecclesiastical law is not confined, as by modern usage, to articles of decoration or embellishment, but it is used in the larger sense of the word 'ornamentum,' which, according to the interpretation of Forcellini's Dictionary, is used 'pro quocumque apparatu, seu instrumento.' All the several articles used in the performance of the services and rites of the Church are 'Ornaments.' Vestments, Books, Cloths, Chalices, and Patens, are amongst church ornaments; a long list of them will be found extracted from Lyndwood, in Dr. Phillimore's edition of Burn's Ecclesiastical Law (vol. 1, pp. 375-6-7). In modern times, organs and bells are held to fall under this denomination.

"When reference is had to the first Prayer Book of Edward the Sixth, with this explanation of the term 'ornaments' no difficulty will be found in discovering, amongst the articles of which the use is there enjoined, ornaments of the Church, as well as ornaments of the Ministers. Besides the vestments differing in the different services, the Rubric provides for the use of an English Bible, the new Prayer Book, a Poor Man's Box, a Chalice, a Corporas, a Paten, a Bell, and some other things."

In the case of *Martin* v. *Mackonochie* (1), on appeal to the Judicial Committee of the Privy Council, their Lordships said in reference to the ornament rubric in the present Prayer Book that "the construction of this Rubric was very fully considered by this Committee in the case of *Westerton* v. *Liddell* (2), already referred to; and the propositions which their Lordships understand to have been established may thus be stated. First, the words 'authority of Parliament' in the Rubric refer to and mean the Act of Parliament, 2 & 3 Edw. 6, c. 1, giving Parliamentary effect to the first Prayer Book of Edward VI., and do not refer to or mean Canons or Royal Injunctions, having the authority of Parliament, made at an earlier period. Second, the term 'Ornaments' in the Rubric means those articles, the use of which,

(1) (1868) L. R. 2 P. C. 365, at pp. 390, 391.

(2) Moore's Special Report, pp. 155 to 159.

1909

ST. PAUL, BOW COMMON (VICAR AND CHURCHWARDENS) v. INHABITANTS OF THE SAME.

Dr. Tristram.

in the services and ministrations of the Church, is prescribed by that Prayer Book. Third, the term 'Ornaments' is confined to these articles. Fourth, though there may be articles not expressly mentioned in the Rubric, the use of which would not be restrained, they must be articles which are consistent with and subsidiary to the services: as an organ for the singing, a credence Table from which to take the sacramental bread and wine, cushions, hassocks, &c.

"In these conclusions, and in this construction of the Rubric, their Lordships entirely concur, and they go far, in their Lordships' opinion, to decide this part of the case."

The question in this case is whether the proposed erection of the screen at the entrance to the chancel with the beam on it and a rood on the beam is an ornament of the church in the sense in which the term "ornament" is used in the rubrics of the Prayer Book, or whether it is merely an architectural adornment or decoration.

If it is a church ornament, in the first sense, unless it is such an ornament as comes within the provisions of the ornament rubric of 1662, or would be subsidiary to the services of the Church as prescribed by law, it is not competent to this Court to grant a faculty for its erection. On this question the observations of Lord Penzance in *Clifton* v. *Ridsdale* (1), giving the history of the introduction of rood beams into England, are material. They are as follows: "And it was to the past that the Court in *Phillpotts* v. *Boyd* (2) emphatically appealed in justification of the Exeter reredos. In speaking of 'painted representations of portions of sacred history, to be found in many of our churches,' the Court relied upon the circumstance that these paintings 'had been proved by long experience to be capable of remaining there without giving occasion to any idolatrous or superstitious practices.' Would an appeal to the experience of the past, in the case of crucifixes, bring out the same result?—or rather, it should perhaps be asked, would not the result be the very opposite? It is precisely here that, to my mind, the great difficulty presents itself in the proposal now made to sanction the restoration of so well known an object as the

(1) (1876) 1 P. D. 316, at p. 354. (2) (1873) L. R. 6 P. C. 435.

1909

ST. PAUL, BOW COMMON (VICAR AND CHURCHWARDENS) *v.* INHABITANTS OF THE SAME.

Dr. Tristram.

crucifix to that place in our churches to which for three hundred years it has been a stranger.

"The crucifix, as set up in our churches, has a special history of its own. Before the Reformation, the 'rood,' was ordinarily to be found in parish churches in this country. It presented the carved, sculptured, moulded, or painted figure of Jesus Christ on the cross, and was, in fact, 'a crucifix, with images at the base.' This figure was erected on a structure called the rood loft, which appears to have traversed the church at the entrance to the chancel; in fact it occupied as nearly as may be the position which the iron screen in the present case does.

"There is in existence the most precise and unquestionable evidence on this matter, and it is to be found in the records of the Lincolnshire parishes, printed in Mr. Peacock's book on Church Furniture, and dated A.D. 1565-6. So universal does the existence of the 'rood' in some form, either sculptured or painted, seem to have been, that in these returns of the churchwardens of upwards of one hundred and fifty parishes there is mention of the rood as having been defaced or pulled down in at least one hundred and forty. It will also be found that in Bonner's Articles, put forth during the reign of Queen Mary, in the year A.D. 1554, inquiry is made 'whether there be a crucifix, a rood loft, as in times past has been accustomed; and if not, where the crucifix or rood loft is become, and by whose negligence the thing doth want.'"

In 1553 (1 Mary) the roods are stated in Heylyn's History of the Reformation, vol. 2, p. 112, Ecclesiastical History Society's edition, 1849, to be ordered to be set up again, and in article 10 of the Articles of Inquiry set forth by Cardinal Pole as Archbishop of Canterbury, A.D. 1557, in his ordinary visitation of the diocese of Canterbury, there is this question addressed to the laity: "whether they have a rood in their church of a decent stature, with Mary and John and an image of the patron of the same church" (1 Cardwell's Documentary Annals, p. 206).

On Queen Elizabeth's accession the Uniformity Act (1 Eliz. c. 2) passed, and by s. 25 thereof it is enacted "that such ornaments of the Church and of the ministers thereof, shall be

1909

ST. PAUL, BOW COMMON (VICAR AND CHURCHWARDENS) v. INHABITANTS OF THE SAME.

Dr. Tristram.

retained and be in use, as was in the Church of England by authority of Parliament, in the second year of the reign of Edward the Sixth, until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of Her Commissioners appointed and authorised under the Great Seal of England for Ecclesiastical Causes or of the Metropolitan of this realm." Pursuant to this clause the Queen granted a commission to the Archbishop, the Bishop of London, Dr. Bill and Dr. Haddon, to reform the disorders of chancels and to add to the ornament of them by ordering the Commandments to be placed at the east end. Dr. Stephens, in a note in his Ecclesiastical Statutes, vol. 1, p. 370, on the words "until other order is made," adds "which other order, at least in the manner prescribed by this Act, is never made; and therefore legally, the ornaments of ministers in performing divine service are the same now as they were in the 2nd of Edward the Sixth."

In 1559 Queen Elizabeth published Injunctions and directed a visitation by Royal Commissioners for the purpose of removing from the churches roods and other images, and the people "had shewed so much forwardness that at once they burnt in St. Paul's Churchyard and other places in the City all the roods and other images which had been taken out of the churches" (Heylyn's History of the Reformation, vol. 2, p. 302, Ecclesiastical History Society's edition, 1849); and in 1561 there was issued by the Queen's Commissioners under the Great Seal for Causes Ecclesiastical, by virtue of Her Majesty's letters addressed to them, an order for altering of rood lofts untransposed in the following terms:—

"Imprimis, for the avoiding of much strife and contention, that hath heretofore risen among the Queen's subjects in divers parts of the realm, for the using or transposing of the rood-lofts, fonts, and steps, within the queres and chancels in every parish church—It is thus decreed and ordained, that the rood-lofts, as yet being at this day aforesaid untransposed, shall be so altered that the upper part of the same with the soller be quite taken down, unto the upper parts of the vautes, and beam running in length over the said vautes, by putting some convenient crest upon the said beam towards the church, with

1909

ST. PAUL, BOW COMMON (VICAR AND CHURCH-WARDENS) *v.* INHABITANTS OF THE SAME.

Dr. Tristram.

leaving the situation of the seats (as well in the quere as in the church), as heretofore hath been used.

"Provided yet, that where any parish of their own costs and charges by common consent will pull down the whole frame and re-edifying again the same in joiners' work (as in divers churches within the city of London doth appear), that they may do as they think agreeable, so it be to the height of the upper beam aforesaid.

"Provided also, that where in any parish-church the said rood-lofts be already transposed, so that there remain a comely partition betwixt the chancel and the church, that no alteration be otherwise attempted in them, but be suffered in quiet. And where no partition is standing, there to be one appointed." (See Heylyn's History of the Reformation, vol. 2, p. 360, note, Ecclesiastical History Society's edition, 1849, and the Appendix to the Second Report of the Royal Commission on Ritual of 1868, p. 403.)

In Bishop Parker's Visitation, 1569, article 6 contains the following question: "Whether the roode lofte be pulled downe, according to the order prescribed: and if the partition betweene the chauncell and the church be kepte?" (1 Cardwell's Documentary Annals, p. 357.)

Also in Archbishop Parker's Articles, 1563, entitled "Articles to be enquired of in the Visitation of the Most Reverend Father in God, Matthew, by the sufferance of God Archbishop of Canterbury, Primate of All England and Metropolitan, A.D. 1563," article 5 has the following passage: "Whether the rood loft be pulled down, according to the order prescribed, and of (*sic*) the partition betwene the Chauncell and the Churche be kept?" (See Appendix, Second Report, Royal Commission on Ritual (1868), p. 403.) So article 38 of Archbishop Parker's Articles in 1595 contains the following passage: "whether the roode loftes be pulled down and a partition made and kept betwixt the Chauncell and the Church, according to the aduertisements?" (See Appendix, Second Report, Royal Commission on Ritual (1868), p. 418.)

Again, in the Articles issued by Aylmer, Bishop of London, A.D. 1577, entitled "Articles to be enquired of within the Diocese

1909

ST. PAUL, BOW COMMON (VICAR AND CHURCH-WARDENS) v. INHABITANTS OF THE SAME.

Dr. Tristram.

of London, in the visitation of the Reverend Father in God, John Bishop of London, A.D. 1577," part of the fourth article is as follows: "Whether your rood lofts be taken downe and altered so that the vpper parts thereof with the soller or loft be quite taken downe vnto the crosse beame, and that the sayde beame have some conuenient creste put vppon the same?" (See Appendix, Second Report, Royal Commission on Ritual (1868), p. 418.)

From the above authorities which I have cited it is clear that the erection of the rood screen which the Court is asked to sanction by faculty in this church is the same as to form and position as was introduced in the churches in England long before the Reformation for use in the services of the Church, and is still placed there in Roman Catholic churches for the same purposes.

It also appears by the citations I have made that during the reign of Edward VI. roods were forcibly removed from all the churches, and in like manner on the accession of Queen Elizabeth they were removed from all our churches under the Act of Uniformity (see s. 25 of 1 Eliz. c. 2)—which is still in force and is referred to in our present Prayer Book—on the ground that they were no longer permitted to be erected in our Catholic but Protestant Church.

Since the reign of Queen Elizabeth the first attempt made for the reintroduction into our churches of an ornament of this description was made to Lord Penzance in the Arches in the case of *Ridsdale* v. *Clifton* (1), who refused to confirm by faculty the erection of a crucifix on a rood beam in the church of St. Peter's at Folkestone, for the reasons stated in his judgment. This refusal was approved of on appeal by the Judicial Committee of the Privy Council. Since that decision there have been, it appears by the Law Reports, five applications to Diocesan Chancellors to sanction the reintroduction into churches of this erection of chancel screens with a rood on the beam of the screen as an architectural ornament—twice before Chancellor Chadwyck-Healey, K.C., first as Chancellor of the diocese of Exeter (2), and

(1) 1 P. D. 316.

(2) See *The Vicar and Churchwardens of Paignton* v. *All having Interest*, [1905] P. 111.

again in October, 1908, as Chancellor of the diocese of Bath and Wells. (1) In both cases he refused the application for reasons given in elaborate judgments. Two other applications were made before the late Chancellor of the diocese of Norwich. He in the first case rejected the application, and in the second one he with hesitation granted the faculty, but subject to the condition for its removal upon evidence of its having been used superstitiously. (2)

In the present case I shall decline to grant the faculty prayed for on the same ground as this Court in December, 1873, refused to grant a faculty for the erection of a baldachino in the church of St. Barnabas, Pimlico (3), which was described as a handsome marble structure or canopy with a pointed roof and three gables pointing different ways, supported by four columns standing apart from the east wall of the church, and which would cover the holy table, extending about two feet beyond the west side of the holy table, leaving sufficient space for the celebrant priest to stand within the canopy, in imitation of the baldachino erected over the altar of St. Peter's at Rome.

The ground on which I was urged to grant the faculty in that case was for the purpose of giving greater dignity and honour to the holy table in the church of St. Barnabas. My answer to this was that the honour and dignity to be given to the Communion table in our churches had been provided for by the rubrics and canons, and I held that it was not within the province of this Court to issue faculties for the purpose of giving greater dignity or honour to the holy table than the simple dignity which is prescribed by the law.

After consideration I have come to the conclusion that the erection of a screen at the entrance to the chancel of a church

(1) See *The Vicar and Churchwardens of St. John the Evangelist, Clevedon* v. *All having Interest*, [1909] P. 6.

(2) See *The Vicar and Churchwardens of St. John, Timberhill* v. *The Rectors, &c., of the Same*, [1895] P. 71; *The Rector, &c., of Barsham* v. *The Parishioners of the Same*, [1896] P. 256. The fifth case referred to by the Court would seem to be *The Vicar and Churchwardens of Great Bardfield* v. *All having Interest*, [1897] P. 185.

(3) See *White* v. *Bowron*, (1873) L. R. 4 A. & E. 207; nomine *The Vicar and Churchwardens of St. Barnabas, Pimlico* v. *Bowron*, Tristram's Consistory Judgments, p. 1.

1909

ST. PAUL, BOW COMMON (VICAR AND CHURCHWARDENS) v. INHABITANTS OF THE SAME.

Dr. Tristram.

with a beam and a rood placed on the beam as prayed for in this case is a church ornament within the meaning of the rubrics, and as it is neither prescribed by the rubrics, nor can be regarded as in any way necessary or subsidiary in the performances of the services of our Church, I decline to order the faculty to issue.

The coloured representation of the screen and rood was produced and marked by the registrar as evidence in the case and having been so marked was returned to the architect.

I should add that when I inspected the church there were no ornaments in it to which objection could be taken, and also that the vicar then pointed out to me that if the faculty should be granted the existence of the screen and the rood beam would materially assist in strengthening the church. This being so, if the Geoffrey family are prepared to erect the screen and rood beam proposed—a very handsome one—without the rood, the accompanying figures, and the inscription, and substitute for the rood a cross, the Court would be prepared to grant a faculty for that purpose.

C. F. J.

THE CADEBY.

1909
May 26, 27.

Admiralty—Ship—Collision—Admission by Defendants that partly to blame—Practice—Burden of Proof—Right to begin.

In an action of damage by collision, the plaintiffs, by their statement of claim, alleged that they had suffered damage by reason of a collision between their vessel and the defendants' vessel solely caused by the negligent navigation of the latter, and they charged the defendants with specific acts of negligence and with breaches of certain articles of the regulations for preventing collisions at sea. The defendants, by their defence, denied that the collision and damage were so caused, and alleged that they were solely due to the negligent navigation of the plaintiffs' vessel, and, after charging the plaintiffs with specific acts of negligence and breaches of certain articles of the same regulations, the defendants counterclaimed for the damage they had suffered by reason of the collision. By their reply, the plaintiffs, as to the defence, joined issue, and, as to the counter-claim, denied the allegations therein contained. Subsequently the defendants, by letter, admitted that the collision was contributed to by fault on the part of those in charge of their vessel:—

Held that, on the pleadings as they stood, even coupled with the defendants' admission of contributory negligence, it was for the plaintiffs to begin, as the burden of proof was upon them to shew affirmatively that the defendants' vessel was solely to blame.

Action of Damage by Collision.

The plaintiffs were the Henry R. James Steamship Company, Limited, owners of the *Henry R. James*.

The defendants were the Cadeby Steamship Company, Limited, owners of the *Cadeby*.

The case is reported on the question of the burden of proof, as involving the right to begin.

On January 20, 1909, about 6 A.M., in fine clear weather, a collision occurred, in the Would channel off the coast of Norfolk, between the screw steamship *Henry R. James*, belonging to Bristol, of 3150 tons gross register, from Sunderland to Newport, Mon., in water ballast, and the screw steamship *Cadeby*, belonging to Hull, of 1130 tons gross register, from Antwerp to the Tyne in water ballast. Both vessels were going about nine knots on nearly opposite courses, and both sustained damage. The plaintiffs issued their writ on the following day, and, on

1909

THE CADEBY.

January 22, an action was entered by the defendants, which, on January 25, was consolidated with the plaintiffs' action.

By their statement of claim, delivered April 2, the plaintiffs alleged that they had suffered damage by reason of the collision "which was solely caused by the negligent navigation of the *Cadeby* by the defendants or their servants as hereinafter appears," and the plaintiffs then set out the circumstances under which, as they alleged, the collision occurred, and they charged the defendants with not keeping a good look out, with neglect to pass the plaintiffs' vessel port side to port side, with improper starboarding of the helm, with not easing, stopping, or reversing, with neglect to comply with arts. 28 and 29 of the regulations for preventing collisions at sea, and, for the damage sustained, the plaintiffs claimed judgment against the defendants and their bail.

By their defence, and counter-claim, delivered April 21, the defendants alleged that "the collision and damage mentioned in the statement of claim were not caused by the negligent navigation of the *Cadeby* but were caused solely by the negligent navigation of the *Henry R. James* by the plaintiffs or their servants as hereinafter appears," and the defendants then set out the circumstances under which, as they alleged, the collision occurred, and they charged the plaintiffs with not keeping a good look out, with improper porting of the helm, with neglect to indicate the course by whistle signal, with not properly exhibiting sidelights, with neglect to slacken, stop, or reverse, and with neglect to comply with arts. 1, 2, 28, and 29 of the same regulations. By their counter-claim, the defendants repeated the allegations already set out in the defence, and said that they had suffered damage by reason of the collision, for the amount of which damage they asked for judgment against the plaintiffs and their bail.

By their reply and defence to counter-claim, delivered April 22, the plaintiffs, as to the defence, joined issue, and, as to the counter-claim, repeated the allegations in the statement of claim, and denied each and all of the allegations repeated in the counter-claim, save in so far as the same were consistent with the statement of claim.

1909

THE CADEBY.

On May 13, the defendants' solicitors wrote to the plaintiffs' solicitors as follows: "While relying on the allegations of fault on the part of the *Henry R. James*, which are made in the defence, we admit, on behalf of our clients, that the collision was contributed to by fault on the part of the *Cadeby*, and we propose to read this letter at the trial."

The hearing took place on May 26 and 27, 1909, and on the preliminary question as to the burden of proof—

Aspinall, K.C., and *D. Stephens*, for the plaintiffs, the owners of the *Henry R. James*, contended that, as the defendants, through their solicitors, had admitted that those in charge of the *Cadeby* were guilty of negligence contributing to the collision, the only issue before the Court was whether there was negligence on the part of those in charge of the plaintiffs' vessel, that is to say, the onus lay on the defendants to prove that those in charge of the plaintiffs' vessel were also to blame, and, therefore, the defendants must begin.

Laing, K.C., and *Dawson Miller*, for the defendants, the owners of the *Cadeby*. The plaintiffs claim judgment against the defendants and their bail for the damage sustained through the collision, and, in order to succeed, they must produce affirmative evidence in support of the allegation that the collision was solely caused by the negligent navigation of the *Cadeby*. The admission made by the defendants goes no further than asserting that both vessels were to blame, and, therefore, as the plaintiffs cannot obtain the judgment they ask for, unless they satisfy the Court that those in charge of the *Cadeby* were alone to blame, the plaintiffs must begin.

THE PRESIDENT (SIR JOHN BIGHAM). On the pleadings as they stand, even coupled with the defendants' admission of contributory negligence, it is for the plaintiffs to begin.

The learned judge (assisted by two of the Elder Brethren of the Trinity House) then heard the evidence of the plaintiffs to the effect that the vessels were red to red when the *Cadeby* improperly starboarded, and then the evidence of the defendants that the vessels were green to green when the *Henry R.*

1909

THE CADEBY.

James improperly ported, whilst the *Cadeby* starboarded. In the result, the *Cadeby* was pronounced alone to blame for not giving the appropriate whistle signal, for not keeping a good look out, and for improperly starboarding.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

T. L. M.

C. A.

1909

June 28, 29, 30.

[IN THE COURT OF APPEAL.]

THE CORINTHIAN.

Admiralty—Ship—Collision—Sound Signal—Contributing to Collision—Regulations for Preventing Collisions at Sea, art. 28.

The plaintiffs' and the defendants' steamships, whilst proceeding, the one up, and the other down, the south channel of the river St. Lawrence, sighted one another at a distance of something under a mile, and were, at that time, practically end on, within the meaning of art. 18 of the regulations for preventing collisions at sea. Those in charge of the defendants' vessel, in breach of the above article, starboarded, and were found alone to blame for the collision which followed. Those in charge of the plaintiffs' vessel ported, in accordance with art. 18, blew a short blast, in accordance with art. 28, and steadied. Shortly afterwards they hard-a-ported, but did not blow another short blast to indicate the course taken. In the Court below it was found that not blowing the port helm signal, when the hard-a-porting took place, had no effect on the collision:—

Held by the Court of Appeal, varying the decision of the Court below, that the plaintiffs' vessel was also to blame, for the statutory presumption of fault could not be avoided except by shewing—which could not be done in this case—that the breach of the rule could not by possibility have contributed to the collision.

The case of *The Bellanoch*, [1907] A. C. 269, was decided on its own peculiar facts, and does not modify the doctrine laid down in *The Fanny M. Carvill*, (1875) 13 App. Cas. 455, n., which was followed in *The Duke of Buccleuch*, [1891] A. C. 310.

APPEAL by defendants, the Allan Line, owners of the steamship *Corinthian*, in an action of damage by collision, against a decision of Bargrave Deane J. finding their vessel alone to blame for a

collision with the steamship *Malin Head*, owned by the plaintiffs, the Ulster Steamship Company, Limited.

The case is reported on the question of the circumstances under which it may be necessary, in order to comply with art. 28 of the regulations for preventing collisions at sea (1), to repeat the sound signal for the purpose of indicating, to the other vessel in sight, the course taken.

On September 13, 1908, about 6.30 A.M., the weather being fine, but somewhat hazy with smoke from bush fires, the wind light from W.S.W., and the tide flood of about two knots, the *Malin Head*—a steel screw steamship of 3467 tons gross register, engines of 335 horse power nominal, carrying a crew of thirty-five hands and a duly licensed pilot—having loaded part of a cargo of wood goods at Rimouski, was proceeding up the south channel of the river St. Lawrence to Quebec to complete her cargo for Belfast and Dublin, and making, at full speed under reduced steam, about 8½ knots through the water, on a W. b. S. ¼ S., magnetic, course, when, a short distance above the Quarantine or Margaret Tail buoy, those in charge sighted ahead, and practically end on, at (as the Court found) something less than a mile, a vessel which proved to be the *Corinthian*, a screw steamship of 6270 tons gross register, a crew of 111 hands, and carrying a duly qualified pilot. She was proceeding down the river from Montreal and Quebec to Havre and London with general cargo and passengers, steering E. b. N. magnetic, and, with engines at half speed, making about eight knots through the water.

The helm of the *Malin Head* was ported a point, one short blast was sounded on her whistle, and then the helm was steadied. Shortly afterwards, as the *Corinthian* appeared to be sheering to port towards the *Malin Head*, the helm was hard-a-ported; but the two vessels came into contact, the stem of the

(1) Art. 28: "The words 'short blast' used in this article shall mean a blast of about one second's duration.

"When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle, or siren, viz.:—

"One short blast to mean, 'I am directing my course to starboard.'

"Two short blasts to mean 'I am directing my course to port.'

"Three short blasts to mean 'My engines are going full speed astern.'"

C. A. 1909

THE CORINTHIAN.

Corinthian striking the *Malin Head* on her port side abaft the main rigging, both vessels sustaining considerable damage.

By their statement of claim the plaintiffs, the owners of the *Malin Head*, charged the defendants with not keeping a good look out, with neglecting to pass port side to port side, with improperly starboarding, or allowing the *Corinthian* to sheer to port, with neglecting to ease, stop, or reverse, and with failure to comply with arts. 18 (1) and 29 (proper seamanlike precautions) of the regulations for preventing collisions at sea.

According to the evidence given by those in charge of the *Corinthian*, the *Malin Head*, when sighted at (as the Court found) something under a mile, was a little on the starboard bow, and the *Corinthian* being then in about mid-channel, the pilot starboarded a quarter of a point to give the *Malin Head* a little more room, whilst the master, thinking that this was not enough, immediately gave the order hard-a-starboard, which order was obeyed, two short blasts being sounded on the whistle. As the *Malin Head* was seen to be porting, the engines of the *Corinthian* were stopped, and put full speed astern, the helm steadied, and three short blasts sounded.

By their defence and counter-claim the defendants, the owners of the *Corinthian*, charged the plaintiffs with not keeping a good look out, with improperly porting, with improperly failing to pass starboard to starboard, with not easing, stopping, or reversing, and with failure to comply with arts. 28 (set out above) and 29 (see above) of the regulations for preventing collisions at sea.

The further charge made by the defendants, that the *Malin*

(1) Art. 18: "When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

"This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

"The only cases to which it does apply are, when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own . . . .

"It does not apply, by day, to cases in which a vessel sees another ahead crossing her own course . . . ."

Head "was improperly beached after the collision on a rocky hard and uneven bottom," was found by the learned judge in the Court below not to have been substantiated, and was not dealt with on appeal.

1909. Feb. 11. BARGRAVE DEANE J. I reserved judgment in this case because I thought it was one in which I should have careful consideration with the Elder Brethren about various points. There is a great conflict of evidence as to the time and the place of the collision—a matter of four or five minutes in time, and about half a mile in place—and I have to say on which side the evidence inclines me to come to a conclusion.

First, it is said on behalf of the *Malin Head* that this was a narrow channel, and that, therefore, the narrow channel rule applies, that each vessel should keep to the starboard hand of the channel, and so navigate it. It is denied on behalf of the *Corinthian* that this is a narrow channel, but that even if it is a narrow channel, the collision took place to the southward of the channel—that would be on the starboard side of the *Corinthian* and the port side of the channel of the *Malin Head*—in which case the *Malin Head*, if it were a narrow channel, would be out of her water. Then there are various other accusations made on one side and on the other, which I will deal with shortly.

Let me first take the case of the *Malin Head*. The *Malin Head* was proceeding up; she had passed Crane Island, altered her course to W. $\frac{3}{4}$ S. until she got to the Margaret Tail buoy, and then she altered the course again to W. by S. $\frac{1}{4}$ S. I am speaking now of magnetic courses. She says that took her to a position which would be to the starboard side of the channel. The pilot on board of her, a man named Santerre, of considerable experience—I forget how many years at the present moment—says that, although it has never been declared to be a narrow channel, he has always acted as though it were; and, in the result, he thinks he should keep, as far as he reasonably might in navigating, to the starboard side going up river; and he said that on this occasion he did; that he passed these various points of Crane Island and Margaret Tail buoy, at a distance which would keep him on the starboard side.

1909

THE CORINTHIAN.

Bargrave Deane J.

Having passed the Margaret Tail buoy, it is said that they saw, at about a mile and a half to a mile and a quarter distance, the *Corinthian*, that her masts and her funnel were in line, that she was practically end on proceeding on an opposite course to the *Malin Head*, and that thereupon the pilot said "Port a little," and they ported a little and blew a short blast signal, that having ported a point and brought the vessel a little on the port bow, the master thought that they ought to port more, and the pilot agreed, and the pilot gave an order "Hard-a-port." They say they did that because they then noticed for the first time that the other vessel was sheering to port as though under a starboard helm, that they did not hear any blast from the *Corinthian*, but that they saw what she was doing, and the only thing to be done under the circumstances was to keep that hard-a-port helm, and to keep going full speed ahead to try and prevent the collision, and then the collision took place at a seven-point blow leading aft. Photographs have been produced shewing the nature of the injuries, and it is said that the *Corinthian* was going at that time at a considerable speed. There is one other point I ought to mention, which is, that those on board the *Malin Head* place the spot of the collision as in the wake of the Margaret Tail buoy, which would be well away to the north or starboard side of the river. That is the *Malin Head's* story.

The Elder Brethren agree with me in their opinion that the distance has been unintentionally exaggerated, and that these vessels sighted each other at a less distance than a mile and a quarter. Both sides agree that there was a good deal of haze about owing to some forest fires on the Canadian side, and that there was a certain amount of thickness in the atmosphere, and our belief is, and my belief is, that these vessels were much nearer than they both thought they were when they first sighted each other. They sighted each other at about the same distance, they both agree about the distance, and I think they both saw each other at the same time, and the same distance, and I think probably the distance was something under a mile, between three-quarters of a mile and a mile.

For the purpose of this case I am taking the chart put in by an official of the Board of Trade, because on that chart there are

1909

THE CORINTHIAN.

Bargrave Deane J.

marked a couple of can buoys which have been put down there for dredging purposes, and the position of which may be material, and I accept that chart as shewing correctly the position of these can buoys. The *Corinthian* was coming down from Quebec, and she says she passed the St. Laurent light higher up the river at a pretty near distance, and then she took a course which took her down in the direction of passing the Margaret Tail buoy. The captain estimates that he passed the light at Bellechasse at a distance which he gives, and steering a course which would take him straight down to the Upper Can buoy; that would take him down, as far as I can judge, looking at the chart, about mid-channel. If he was coming down about mid-channel, and the *Malin Head* was coming up, as she says she was, to the northward of mid-channel, the vessels would be port to port. But the *Corinthian* says this: "Proceeding down on my course as given I sighted this vessel a little on my starboard bow, and seeing this vessel on my starboard bow, and there being no narrow channel rule, I starboarded, to give her a little more room, a very small amount."

Now I come to the evidence which has been given on that point. First of all, the man on the look out says "We sighted the *Malin Head* right ahead"; the chief officer on the bridge says "She was a little on our starboard bow"; the pilot says "She was a little on our starboard bow, and I starboarded to give her a little more room"; but, immediately the pilot had said "Starboard a quarter of a point," the captain apparently saw that that was not enough, and he at once said "Hard-a-starboard." I say that the captain said so because, although the captain denied it, the helmsman said that he did give the order and that he did hard-a-starboard. Therefore I think that, so far as the evidence from the *Corinthian* is concerned, there is great contradiction, and in that contradiction I believe that this vessel did hard-a-starboard; first of all starboarded a little, and then hard-a-starboarded. The pilot on the *Corinthian* was a younger man, he had only been a much shorter time accustomed to these waters, and he said he knew nothing whatever about the narrow channel rule as applicable to this particular river.

In the absence of any direct evidence about it, I am not

1909

THE CORINTHIAN.

Bargrave Deane J.

prepared to hold that this is a narrow channel within the article, and I am still more inclined to hold that, when I look at the nature of the channel, the lights, and the buoys; for, although by daylight it would be easy to treat it as a narrow channel, because the buoys would be visible, I think it would be very difficult at night for a vessel going down to be able to keep to the starboard side of the channel with accuracy, and I do not think that it is possible for this Court to hold that this place is a narrow channel. I am certainly not prepared to hold in this particular case that this is a narrow channel. But I think it is a river in which, as Santerre, the *Malin Head's* pilot, distinctly says, there ought to be navigation on the principle of a narrow channel; that is to say, a vessel should, as far as possible, attempt to pass port to port, quite apart from the article which says that vessels approaching end on, or nearly end on, shall pass port to port. But I am dealing for the moment with the question of a narrow channel, and, therefore, having got the uncertain evidence of the two pilots now before me, I am not prepared to hold that it is a narrow channel. These vessels were approaching, as I have said, on opposite courses. Why did the captain of the *Corinthian*, when the pilot said "Starboard a little," at once say "Hard-a-starboard"? It is quite clear that the vessels were so nearly end on that "starboard a little" would not have been sufficient; therefore that incident would lead me still more to believe that these vessels were practically end on.

Taking the conflict of evidence between the two, I believe the evidence of the *Malin Head* in preference to that of the *Corinthian*, and I believe that the difference from being exactly end on was that they were rather more port to port than starboard to starboard.

Now I have got the *Corinthian* hard-a-starboarding, and I have got the *Malin Head* hard-a-porting. Immediately after the hard-a-porting of the *Malin Head*, according to the evidence from the *Corinthian*, the order was given "Full speed astern," and the engines were put full speed astern. That is said to have taken place according to the log—I am dealing now with the two scrap logs—at 6.20, the collision being at 6.26, so that it is alleged that for six minutes this vessel was going full speed

astern. The collision took place with the result that we have seen from the photographs, and we have got statements from the *Corinthian* that, instead of going ahead through the water, they were actually making sternway. If she was making sternway, how could there be this gash in the after port side of the *Malin Head* which undoubtedly was made? I know it is very difficult to come to an absolute conclusion from photographs, or, from the nature of an injury as proved, to demonstrate the exact speed with which one vessel struck another. All sorts of extraordinary results do occur: it is very difficult to come to a true conclusion, but the conclusion I have come to is that the evidence from the *Corinthian* is not true, that she was reversing for six minutes. [The learned judge then dealt with the entries in the deck scrap log and in the engineer's scrap log of the *Corinthian* with reference to the time immediately preceding the collision, and having stated that their condition was not satisfactory, the learned judge proceeded:—]

Therefore I approach this case distinctly with a bias against the credibility of the evidence from the *Corinthian*. As I have said at starting, I believe that these two vessels sighted each other when they were very much nearer. The distance and time, of course, are very important, because, if the *Corinthian* did not reverse at the time she says she did, well, then, that would be a ground for the belief that this injury to the *Malin Head* was caused by the *Corinthian* going ahead and not by her going astern at the time of the collision.

The point which is next made is this: It is said that you, the *Malin Head*, did not give a signal that you were porting. Well, now, it is sworn that the *Malin Head* did at the time when she says she first ported give one blast to signify that she was porting. It is admitted by some of those on board the *Corinthian* that they did hear the one blast signal, but they say it was just before the collision and not earlier; but when we come to deal with shorter distances and shorter times, from the time the vessel was first sighted, it is very difficult to see what is meant by "shortly before the collision." The fact that the *Malin Head* was seen to be porting by those on board the *Corinthian* is admitted. They all say, "We saw that she was going off to starboard, and we

1909

THE CORINTHIAN.

Bargrave Deane J.

saw that she was under a hard-a-port helm, and it was thereupon that we reversed our engines." If she reversed her engines at a distance much less than a mile it is quite intelligible that there should be this injury done. The *Malin Head* said, "I blew my whistle when I first ported, then I steadied, and almost immediately afterwards hard-a-ported, and I did not blow a second time." I have to ask myself this question—and it is a difficult question, in my opinion—Did the non-blowing of the whistle on the second occasion of the hard-a-porting in any way cause a possibility of this collision? That is to say, was the non-blowing of the whistle a possible cause of this collision?

I must put myself within the wording of the Lord Chief Justice's judgment in *The Anselm*. (1) That is a very difficult case for me to deal with, for this reason: that was a decision overruling my own judgment, and therefore I have to be very careful not to go beyond, or outside, the decision of the Court of Appeal. On looking at *The Anselm* (1) I find in my judgment I said this (2): "No signal was sounded when those engines were reversed, although the rule says that when the engines are reversed three blasts shall be given on the whistle denoting that fact. Here again was a distinct breach of the rule, and a breach which I think it is my duty to say is a serious breach. It cannot be too strongly impressed upon officers in charge of ships that they must obey the regulations. If they do not obey the regulations they run a very serious risk. Here again I have to ask myself the question—and I have the advantage of the Elder Brethren's advice. In our opinion his not obeying the regulations did not in this case contribute to the collision." That is a distinct finding of fact. Now I turn to the decision of the Court of Appeal. The Lord Chief Justice says this (3): "Then there is the non-signalling that she was reversing. We are advised by our nautical assessors, who have also advised us with regard to the port helm signal, that the non-indicating to this vessel which was rapidly approaching that the *Anselm* was reversing her engines was abstaining from giving her information which might be useful, if only for the purpose of calling her marked

(1) [1907] P. 151. (2) Ibid. at p. 156.
(3) Ibid. at p. 166.

1909

THE CORINTHIAN.

Bargrave Deane J.

attention to what was going on in front of her. That seems to me the essence and pith and marrow of the rule which indicates that these signals are to be given. Then for a substantial time the *Anselm* neglects to reverse her engines. I have already said the vessels were approaching at a combined speed of twenty-two or twenty-three knots. The *Anselm* sees a mile or a little over a mile off a vessel coming down starboarding her helm, and it seems to me elementary that at that time there was serious risk of collision, and it was the duty of the *Anselm* to take her way off as soon as she possibly could, and so to have avoided, or, at any rate, reduced, the danger of collision." Then the learned judge says: "I therefore come to the conclusion that the *Anselm* was to blame in these three respects, and that as regards two of them, namely, neglect to give sound signals when porting and when reversing, it is quite impossible to come to the conclusion that they had no effect upon the collision." And then he says: "Where persons are attacked, and it is proved against them that there is a serious breach of statutory rules, I have very grave doubt whether they can be said to fulfil the obligations upon them if they do not satisfy the Court by affirmative evidence that the breach of the rules has no possible effect."

Now that is distinctly a question of fact. I had the advantage of seeing the witnesses in the case of *The Anselm*. (1) The Court of Appeal had not. The Elder Brethren who sat with me had the opportunity of seeing the witnesses, and they advised me that in that particular case the non-giving of the signal of reversing had no effect on the collision. The Court of Appeal, advised by two different gentlemen, who did not see the witnesses, said as a matter of fact that I and the Elder Brethren were wrong. It is a very awkward position which this Court is put into when the Court, being advised by two nautical assessors, very competent, as the Elder Brethren always are, should be overruled on a question of fact by two gentlemen who have not seen the witnesses. However, it comes to this: the Lord Chief Justice says that this Court has to be satisfied as a question of fact whether the non-giving of a signal had any possible effect on the collision. I am advised in this case by the Elder Brethren,

(1) [1907] P. 151.

1909

THE CORINTHIAN.

Bargrave Deane J.

and I certainly agree with them, that in this particular case not blowing the port helm signal when the hard-a-porting took place had no effect on the collision, because it is proved, and distinctly proved, by those on board the *Corinthian* that they saw this vessel hard-a-porting for some considerable time before the collision. They put it at five minutes. If that is so, and they saw this vessel hard-a-porting for five minutes, who can say that the fact that a blast was not blown had any effect really on the knowledge of those who were navigating the *Corinthian*?

As I say, I am in an awkward position with regard to the Court of Appeal; but I have to take my own line in this case; and as a matter of fact I find—and I am advised—that the non-blowing of the port helm signal when the vessel hard-a-ported, she having given a port helm signal, when she ported just previously, did not affect the collision, and therefore is not a matter of blame to be attributed to the *Malin Head*.

Now I start again with this: that I find these two vessels were approaching each other end on, or very nearly end on, and that it was the duty of both of them under the rules to port. The *Corinthian* starboarded, and I think that she was breaking the rule under the circumstances. Now why did she starboard, if they were end on, or nearly end on, and the rule is clear? I think the answer is clear from the evidence of the *Corinthian*. They say they wanted to make the Margaret Tail buoy. They say it is not a narrow channel. We could go where we liked. We wanted to make the Margaret Tail buoy because the weather was sufficiently thick for us to anchor up on the north side of the channel if we did not find the Margaret Tail buoy, and that is what we intended to do. The pilot would not anchor in the middle of the channel, but out of the channel on the north side, and it is perfectly clear that when the *Corinthian* saw this vessel ahead of her the pilot and the master determined to go well to the north; the pilot having starboarded a little, the captain said "Hard-a-starboard," being determined to go off to the north, and he persevered in that, and then, seeing that the other vessel was porting, there was nothing for him to do but to reverse his engines, but he reversed them too late, that is to say he reversed them at a time which was too late, because it was impossible to

avoid the collision. The fact that the vessel meant to go to the north emphasizes rather the fact of her starboarding than the fact that she was starboard to starboard with the *Malin Head*.

Now something has been said about the *Malin Head* being beached at an improper place. [The learned judge dealt with this point, and found that she was beached at the best place she could, in the circumstances, be beached at, and no blame could be attributed to her for that.]

So far as I know I have dealt with all the points in this case. I think that the fact that the *Malin Head* kept on at full speed to try and avoid the collision was the right course for her to take. If she had reversed she would probably have been struck further forward. I do not think that any blame can be attached to her for any other matter, and therefore I must find that the *Corinthian* is alone to blame for this collision.

Under the terms of the notice of appeal, the defendants moved that the judgment of Bargrave Deane J. should be reversed or varied by pronouncing that the collision was occasioned by the fault or default of those in charge of the *Malin Head*, or, in the alternative, that both vessels were to blame; but as the Court of Appeal (which was assisted by nautical assessors) intimated that, in any event, the decision in the Court below, that the *Corinthian* was to blame, must stand, the arguments of counsel for the appellants that the *Malin Head* was alone to blame for not stopping and reversing, in accordance with the principles laid down in *The City of Berlin* (1), are omitted, and only the arguments dealing with the question that the *Malin Head* was also to blame are set out.

June 28, 29, 30. *Aspinall, K.C.*, and *C. Robertson Dunlop*, for the appellants (defendants), owners of the *Corinthian*. In the Court below it was found that the *Malin Head* ported, sounding the appropriate one short blast, that she then steadied, and subsequently hard-a-ported, but did not sound another short blast signal, and, with reference to that omission, the learned judge asked himself this question: "Did the non-blowing of the

(1) [1908] P. 110

C. A. 1909

THE CORINTHIAN.

whistle on the second occasion of the hard-a-porting in any way cause a possibility of this collision?" The answer was, "As a matter of fact I find—and I am advised—that the non-blowing of the port helm signal when the vessel hard-a-ported, she having given a port helm signal, when she ported just previously, did not affect the collision, and, therefore, is not a matter of blame to be attributed to the *Malin Head*." The following passage from the judgment of Fletcher Moulton L.J. in *The Bellanoch* (1) indicates, it is submitted, the inaccuracy of this answer as matter of law: "the issue thus raised is not whether the performance of the obligation would have affected the collision, but whether it could possibly have done so. For instance, if a ship is run down in broad daylight her rights would not be affected by the fact that she was not carrying an efficient fog horn, or if she was run down by a vessel which was all the time to port, her rights would not be affected by its being shewn that something was wrong with her starboard light, if that could not possibly have been seen by the offending vessel. The circumstances in *The Duke of Buccleuch* (2), which is the case usually quoted in support of the doctrine, were substantially of this latter kind, inasmuch as the statutory breach was a defect in one of the lights of the vessel which could not possibly have affected the matter." Similar observations had been made by Lord Alverstone C.J. and the same Lord Justice in the earlier case of *The Anselm*. (3) In the result there was, in this case, an infringement of a regulation for preventing collisions at sea, which might by possibility have contributed to the collision, and, therefore, under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), the *Malin Head* is to blame, for the Court is not called upon, in collision cases, to determine upon conflicting evidence the question of fact whether or no the infringement of the regulation applicable to the case, and that might by possibility have contributed to the collision, did, in fact, contribute to the collision: *The Fanny M. Carvill*. (4)

[They were stopped by the Court.]

Laing, K.C., and *Adair Roche*, for the respondents (plaintiffs),

(1) [1907] P. 170, at p. 190.
(2) [1891] A. C. 310.
(3) [1907] P. 151, at pp. 165, 169.
(4) 13 App. Cas. 455, n.

owners of the *Malin Head*. The evidence given by the master of the *Malin Head* was to the effect that when the *Corinthian* "bore a little, just the least thing, on the port bow, nearly ahead," her masts being "nearly in a line," the pilot ordered the man at the wheel to port a point, bringing the vessel to W. ½ S. by the standard compass, and one short blast was given on the whistle. The vessel was steadied on that course, but, on observing that the *Corinthian* was sheering towards them, the pilot ordered the man at the wheel to put the helm hard-a-port, and to the question whether any signal was then blown, the answer of the master was "no," because he "had already given the port helm signal"—that is to say he had, in the words of art. 28, given one short blast to mean "I am directing my course to starboard."

With reference to that evidence the learned judge in the Court below says that "the fact that the *Malin Head* was seen to be porting by those on board the *Corinthian* is admitted," for they say "We saw that she was going off to starboard, and we saw that she was under a hard-a-port helm." Upon that evidence the Court found that the non-blowing of the port helm signal when the *Malin Head* hard-a-ported did not affect the collision. The object of the regulation as to sound signals is to inform the other ship, and if the other ship is informed of what is being done, and is aware of it, then the alleged omission to sound the whistle a second time cannot have contributed to the collision; in other words, the *Malin Head* had ported, and steadied, and was not obliged to sound the whistle again on accentuating the action of the helm. In the case of *The Bellanoch* (1) in the House of Lords, Lord Loreburn L.C., when commenting on the absence of three short blasts, says: "The master of the *Canning* knew perfectly well what was the course of the *Bellanoch* and what her manœuvre was, and the whistle could not have told him anything he did not know already, and could not have affected his action"; that is to say, before those in charge, in that case of the *Bellanoch*, and in this case of the *Malin Head*, can be held to be to blame, the Court must find them guilty of some negligence contributing to the collision, but the facts do not, in either case,

(1) [1907] A. C. 269.

C. A. 1909

THE CORINTHIAN.

admit of such a finding. [On the question of the collision being inevitable whatever was done *The Bywell Castle* (1) was cited.]

Aspinall, K.C., in reply. The breach of the rule consisted in not blowing a short blast on hard-a-porting, which was a distinct manœuvre, for the *Malin Head* had steadied on a course after the first porting. It was not merely an accentuation of the action of the helm. *The Bellanoch* (2) was decided on the peculiar facts of that case, and did not, and was not intended to, modify the principles laid down in *The Duke of Buccleuch* (3), in which case, though the House of Lords was equally divided on the question of fact, all the learned Law Lords were agreed as to the decision of the Court of Appeal upon the question of law, that is to say, they approved of the doctrine laid down in *The Fanny M. Carvill.* (4)

VAUGHAN WILLIAMS L.J. This is an appeal from the decision of Bargrave Deane J. He held that the *Corinthian* was solely to blame. So far as that decision is concerned it has not been seriously alleged that the *Corinthian* was not in fault, and, so far as the *Corinthian* has been held to be to blame, we cannot interfere with his decision.

The question then arises whether the *Malin Head* is to blame, and, of course, as far as the decision of Bargrave Deane J. is concerned, in holding the *Corinthian* solely to blame he exonerated the *Malin Head* from blame. We have had an argument before us to shew that the *Malin Head* was in the wrong quite irrespective of art. 28, but we have not, having regard to our view, to consider that question at all, because, although, if we had exonerated the *Malin Head* from blame as far as the breach of the regulation contained in art. 28 was concerned, we might have had to go on and consider whether, on other grounds, the *Malin Head* ought to be held to blame, we have not got to do so because we have arrived at the conclusion that the *Malin Head* was to blame in respect of having omitted to give the proper blast.

We have come to the conclusion that there was a breach of the

(1) (1879) 4 P. D. 219.
(2) [1907] A. C. 269.
(3) [1891] A. C. 310.
(4) 13 App. Cas. 455, n.

regulations in art. 28 by the omission of the *Malin Head* to give the proper blast in accordance with that article, which runs thus: [The learned judge read the article already set out, and continued:—] There have been discussions in earlier cases as to the meaning to be attached to the word "authorized," but no such question is raised here. Now, it is admitted that in point of fact the *Malin Head* did fail to give the short blast which is prescribed by this article.

The question which arises in this case is this: We have come to the conclusion that there was a breach by the *Malin Head*, because we have accepted to the full the rule which was laid down by the House of Lords in the case of *The Duke of Buccleuch*. (1) It is there laid down that in order to exonerate from blame —under s. 17 of the Merchant Shipping Act, 1873, that is, under s. 419, sub-s. 4, of the statute now in force, namely, the Merchant Shipping Act, 1894—a ship which has failed to give the proper blast prescribed by art. 28, it is necessary to prove that the failure to give the blast could not possibly have affected the collision, and that it is not sufficient—and, indeed, is not admissible—for the ship which has been guilty of this failure to give the proper blasts to say that the failure to give the blasts did not in fact affect the collision. As I understand, what is said on behalf of the *Malin Head* is that the rule as laid down by the House of Lords in *The Duke of Buccleuch* (1), approving *The Fanny M. Carvill* (2), is no longer in force, but has been modified or explained by the decision of the House of Lords in the case of *The Bellanoch* (3), so that the ship guilty of the omission can now be heard to say, for the purpose of exonerating herself from the penalty of s. 419 of the Merchant Shipping Act, 1894, that the omission to give the proper blast did not in fact affect the collision.

We have come to the conclusion that that contention cannot be supported, and that the case of *The Bellanoch* (3) in the House of Lords has not explained or modified the rules laid down by the House of Lords in 1891 in the case of *The Duke of Buccleuch* (1) so as to render admissible evidence or proof that

(1) [1891] A. C. 310. (2) 13 App. Cas. 455, n.
(3) [1907] A. C. 269.

C. A. 1909

THE CORINTHIAN.

Vaughan Williams L.J.

the failure to give the proper blast did not in fact affect the collision, the ruling in *The Duke of Buccleuch* (1) being that it was not admissible.

Now, I wish to say very little more beyond referring to the report of the case of *The Duke of Buccleuch* (1), and then referring to the judgment of Lord Loreburn in *The Bellanoch*. (2) In the case of *The Duke of Buccleuch* (1) the head-note is this: "The true construction of this section is that the infringement must be one having some possible connection with the collision; or, in other words, the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision; and the burden of shewing this lies on the party guilty of the infringement; proof that the infringement did not in fact contribute to the collision being excluded."

The real argument before us in respect of this point has simply been that the result of the decision in *The Bellanoch* (2) is that now proof that the infringement did not in fact contribute to the collision is not excluded, and that there has been that modification of the ruling in *The Duke of Buccleuch*. (1) It is further said—the same thing in other words—that the presumption of culpability can be got rid of now not only by proof that the infringement could not by any possibility have contributed to the collision, but also by proof that the breach of the rule did not, in fact, contribute to the collision.

Now, when I come to the case of *The Bellanoch* (2), I ask myself this question. It is said that the House of Lords overruled or modified their previous decision, not because they said so in words, but because the conclusion arrived at by the House of Lords in *The Bellanoch* (2) can only be justified upon the assumption that they did reverse the decision in *The Duke of Buccleuch* (1), and did extend the exoneration from the presumption of culpability, so as to allow it now to rest upon a mere proof that the collision was not, in fact, contributed to by the omission to comply with art. 28. I can only say, speaking for myself, that I should find it very difficult to arrive at the conclusion that it was the intention of the House of Lords to

(1) [1891] A. C. 310. (2) [1907] A. C. 269.

reverse their previous decision or so to modify it as to make it no longer of any force, unless the House of Lords in terms said so, and told us why they had come to the conclusion that it was necessary so to do. They have not done so. In these circumstances, although I agree that the words of the judgment of Lord Loreburn are such as rather to favour than otherwise the contention that the House of Lords did thus alter their decision of 1891, yet I cannot believe that they intended to do so. Moreover, when I come to look at the facts of the case of *The Bellanoch* (1) I see that it is perfectly reasonable and possible that the House of Lords should have come to the conclusion they did in *The Bellanoch* (1) without really in the slightest degree departing from the ruling in *The Duke of Buccleuch.* (2) The reason I say this is that it is quite plain that art. 28 was only intended to apply to cases where vessels are taking a course in sight of each other, and unless you find as a fact that the vessels whose culpability was being dealt with were at the moment of the breach in that relation to each other and under those conditions to which art. 28 was intended to apply, then the article does not apply. I do not propose to go in detail into the facts of the case of *The Bellanoch* (1), but it is perfectly clear that at the moment of the failure to give the blast the *Bellanoch* was not making really a sea manœuvre at all, but, being imbedded more or less in the mud, was merely putting her engines astern for the purpose of freeing herself, and not for the purpose of any manœuvre in relation to the other vessel. Under these circumstances I do not regard the case of *The Bellanoch* (1) as in any way having altered or modified the ruling in the case of *The Duke of Buccleuch.* (2) If the person guilty of the breach has failed to prove that it was impossible for the omission to have contributed in any way to the accident, the *Malin Head* must be held to blame. Counsel for the appellants have contended before us that no such impossibility could be shewn. This is not a case in which the *Malin Head* is able to say that at the moment when the breach of art. 28 occurred the collision was inevitable. I have not got to decide to-day whether, if that had been proved, it would have exonerated the *Malin Head* from

(1) [1907] A. C. 269. (2) [1891] A. C. 310.

C. A. 1909

responsibility, and in these circumstances I think the appeal must be allowed to the extent of holding both vessels to blame.

THE CORINTHIAN.

FLETCHER MOULTON L.J. In this case the learned judge in the Court below held that the whole blame lay with the *Corinthian*. The owners of the *Corinthian* appeal, and the appeal raises two questions. In the first place they say that the evidence established that the *Malin Head* was alone to blame. Secondly they contend that if they do not succeed in shewing upon the evidence that the *Malin Head* was alone to blame, certainly she was also to blame and both vessels should be found to blame. We have not heard counsel for the respondents at all upon the first point, because we have come to the conclusion that the evidence is not such as to enable us to say that the learned judge was wrong in finding that the *Corinthian* was to blame. I must say that the argument addressed to us by both counsel on behalf of the *Corinthian* was a very powerful one, and worthy of very careful consideration, but I do not think that either of them was able to bring the case to such a point that we ought to interfere with that part of the judgment of the learned judge. Therefore as counsel for the respondents have not been heard at all upon the matter, I say nothing about it except that the appeal fails to that extent.

The second question, as to whether the *Malin Head* must also be held to blame, raises points both of law and fact, but the only point on which I propose to base my judgment involves mainly a question of law, although, of course, I have to examine the facts of the case to shew that it comes within the principle of law which I hold to be applicable.

It is admitted that the *Malin Head*, when the *Corinthian* was approaching her, ported, sounding a proper signal, and then steadied. She then went on for a time variously fixed at two minutes or something more, but certainly for an appreciable time, during which she was enabled to watch the behaviour of the *Corinthian* in the new circumstances. Then finding that the *Corinthian* was still sheering towards her, she hard-a-ported her helm, but gave no corresponding sound signal to inform the *Corinthian* of what she had done. Those facts appear to me to be

clear on the evidence. The evidence called from the *Malin Head* admits the failure to sound the signal, and it is from the evidence of those who were called on behalf of the *Malin Head* that I extract the other facts that I have given. It appears to me, therefore, to be incontestable that there were three manœuvres by the *Malin Head*. The first was the porting and then the steadying, the second was the continuing on a course after steadying, and the third was the hard-a-porting on the occasion when the proper sound signal was not given. Now, counsel for the *Corinthian* claim that that makes the *Malin Head* to blame under the statute, and they appeal to the well-known s. 419, sub-s. 4, of the Merchant Shipping Act, which says that where in the case of a collision it is proved that any of the regulations have been infringed, the ship by which the regulation has been infringed will be deemed to be in fault unless it is shewn to the satisfaction of the Court before which the case is tried that a departure from the regulations was under the circumstances of the case necessary.

Taking the words of that clause, the *Malin Head* incontestably comes within it, because she did infringe that one of the collision regulations which relates to giving sound signals, and it has not even been attempted to be shewn that the circumstances of the case made a departure from the regulations necessary. If the section stood alone, this case would in my opinion be unanswerable. But the question whether the words of the statute should be literally interpreted has been considered in several cases, and for our purposes we must take the decision which binds us, namely, the decision of the House of Lords in *The Duke of Buccleuch*. (1) That was a peculiar case, but the decision is one of great weight because all the members of the tribunal were clearly of one opinion with regard to the law, though they differed with regard to the facts so much that there were two on one side and two on the other, and the decision of the Court of Appeal was therefore allowed to stand. Each of their Lordships said they were agreed as to the law. They did not lay it down in new language because they said they were satisfied it was laid down correctly in the case decided in the Privy Council, *The Fanny M. Carvill* (2),

(1) [1891] A. C. 310. (2) 13 App. Cas. 455, n.

C. A. 1909

THE CORINTHIAN.

Fletcher Moulton L.J

and although some of their Lordships actually quoted the paragraph of Sir James Colville's judgment in that case which they considered laid down the law, and others did not, there is no question whatever as to what passages in that judgment all the members of the House considered to represent the law and specifically approved of. So that we must turn to the case of *The Fanny M. Carvill* (1) for an authoritative statement of the law which is binding upon us as a decision of the House of Lords. The judgment of Sir James Colville is clear and well reasoned out, and it faces this difficulty—that if you take the mere words of the section of the statute, the consequences would be that any vessel that was not adequately equipped or in any other way was violating the regulations would, as he says, be a sort of outlaw of the seas, and would not have the right to recover, in any circumstances, more than half the damages to which by the general law maritime she might be entitled, and that quite independently of whether the defect was or was not known to the owners or had under the circumstances any effect or any possibility of effect upon the collision. The example which occurs to one is that of a collision in clear weather and broad daylight where it is proved there was some defect in the ship's fog horn. The Privy Council came to the conclusion that they were not bound to take an interpretation so harsh, although it was probably the natural interpretation of the mere words of the statute, and they therefore came to the conclusion that the statute did not include a case where the breach of the regulations was of such a nature that it could not by any possibility have contributed to the collision. I have no doubt they had in their minds such a case as that to which I have referred. But they laid it down in the clearest language that mere proof that the infringement of the regulations did not in point of fact contribute to the collision is inadmissible. In other words, it is immaterial whether the breach did or did not contribute to the collision. If by any possibility it might have contributed to the collision the statute applies. Speaking for myself, although I accept the decision and recognize that undoubtedly it is binding upon us, I do not think that it does away with the fact that the section abstains from

(1) 13 App. Cas. 455, n.

using any words which couple the breach with the collision as cause and effect. There is nothing whatever in the section which would lead one to suppose that it was necessary they should be so connected. The only exception that is made to the universal applicability of the rule is where the breach was justified by the circumstances, and there is no indication whatever of a tenderness towards the party committing the breach on the ground that it probably did no harm.

The law thus laid down is expressly approved of in the House of Lords. Let me apply it to the present case. Here there was a third manœuvre, namely, the hard-a-porting, and there is evidence that the two vessels were not so close together at the moment that a change of action on the part of the *Corinthian* might not have saved or modified the collision, if it had taken place at the time when the *Malin Head* hard-a-ported her helm. If the *Malin Head* had obeyed the regulations and had sounded her whistle directly she hard-a-ported her helm there would have been an unmistakable indication to those on board the *Corinthian* that she had done so. As it was, in the absence of that indication the *Corinthian* had to trust to conclusions drawn from observation as to whether the *Malin Head* was hard-a-porting or not; and quite apart from the question as to whether they might or might not make a mistake in drawing such a conclusion, some time must necessarily elapse before they could by observation tell with certainty what the *Malin Head* was doing. So that it is possible that the fault of the *Malin Head* may have contributed to the collision.

There is, however, another consideration. It would have been another appeal to the *Corinthian* to consider her course, because it would have been a direct indication, a direct statement, that the *Malin Head* was deliberately porting, and you cannot say that that additional intimation might not have had an effect upon the mind of the person who was regulating the course of the *Corinthian*, even though he had from his own observation drawn a conclusion that that was the state of affairs. I think that this last consideration is one which ought to prevail in most if not all cases. For my own part I doubt whether a ship is exonerated from the consequences of s. 419 unless the breach of the

C. A. 1909

THE CORINTHIAN.

Fletcher Moulton L.J.

regulations of which she is guilty is from its very nature a breach which by no possibility can contribute to the collision. I do not think it is legitimate for the Courts to listen to arguments that the man knew it otherwise, and therefore it was of no use to tell him so in the regular way. We have not got to speculate what would be the effect upon his mind of being informed in the way in which he has got a right to expect to receive information. So soon as we come to the conclusion that the breach is not of such a nature that it could not by any possibility have contributed to the collision, we ought to shut our ears to arguments as to whether it is probable it did or did not. Even though we come to the conclusion that the collision would have occurred just the same if the breach had not occurred, that fact is not sufficient of itself to free the defendant vessel from the consequences of her fault.

I should have said that the above is the law laid down in the House of Lords and consistently followed by other Courts. But an appeal has been made to the more recent decision of the House of Lords in *The Bellanoch*. (1) I wish to say with regard to that case that there is nothing whatever in the opinions of the learned Lords which indicates any intention to vary or depart from the law as laid down by the decision in *The Duke of Buccleuch* (2), which was quoted to them in argument and must have been present to their minds as being the authoritative decision as to the law of the case. The later case is purely a decision upon fact, and when I see that Lord Macnaghten, who was a party to the decision in *The Duke of Buccleuch* (2), was also a party to the decision in *The Bellanoch* (1), and I can find no word anywhere, in the opinions delivered in the later case, indicating any intention to reinstate or vary the law as laid down in the previous case, I cannot but come to the conclusion that their Lordships thought they were only applying the same law as was applied in *The Duke of Buccleuch*. (2) It is therefore only a decision turning on facts which were very peculiar. It is very doubtful whether the ship was actually moving at all, or whether the movement of the engines was only for the purpose of clearing out mud from under the vessel. In those

(1) [1907] A. C. 269. (2) [1891] A. C. 310.

circumstances I do not feel myself justified in deviating in any way from the law specifically and intentionally laid down in the case of *The Duke of Buccleuch*. (1) For these reasons I think that the *Malin Head* committed a breach of the regulations in not sounding her whistle, and that it is not proved as a fact that this breach of the regulations could not possibly have contributed to the collision, so that the *Malin Head* must be held to be also to blame.

Buckley L.J. The *Corinthian* appeals from a judgment by which she has been held alone to blame. I propose to deal first with that part of the argument of the appellants which affirms that the *Malin Head* is to blame or also to blame, and having regard to the recent decision of the House of Lords in the case of *The Bellanoch* (2) to state what, as I understand it, is the law which we have to apply. Article 28 of the regulations for preventing collisions at sea provides that certain helm signals shall be given by sound, and s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, provides that where in a case of collision it is proved that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulations necessary. That was not shewn in the present case. In *The Fanny M. Carvill* (3) it was decided that the effect of the Act of Parliament is that it excludes all proof that the infringement which might have contributed to the collision did not, in fact, do so, and throws upon the ship guilty of the infringement the burden of shewing that it could not possibly have done so. The Court found its way to relax the great harshness of the statute by allowing that exception. If, therefore, the allegation is that the breach of the regulation might have contributed, but did not contribute, to the collision, no evidence is admissible. The statute has excluded it. But the allegation may be made and may be supported that the breach of the regulation could not possibly have contributed to

(1) [1891] A. C. 310. (2) [1907] A. C. 269.
(3) 13 App. Cas. 455, n.

C. A. 1909

THE CORINTHIAN.

Buckley L.J.

the collision. Upon that contention, of course, certain evidence is admissible, as, for instance, evidence of the position of the vessels, but no evidence is admissible on facts which are excluded by the previous rule. For instance, in *The Fanny M. Carvill* (1) evidence was admissible to shew the relative position of the two vessels, so as to demonstrate that as a matter of fact the green light of the *Peru* never could have been seen by the *Fanny M. Carvill*. But, by way of contrast to that, evidence would not have been admissible for the purpose of shewing that although the green light of the *Peru* was visible from the deck of the *Fanny M. Carvill*, yet those on board the *Fanny M. Carvill* were so ignorant of all maritime rules that they would not have known what a green light meant.

The law thus laid down in *The Fanny M. Carvill* (1) was deliberately adopted in the House of Lords in *The Duke of Buccleuch* (2), and the point which has given me most concern is whether the House has in *The Bellanoch* (3) gone back in any way upon the law as previously laid down. Now, in the first place, having regard to the fact that in *The Bellanoch* (3) the case was argued for the appellants upon citation of *The Duke of Buccleuch* (2) and *The Fanny M. Carvill* (1), and that the respondents were not called upon, it seems impossible to suppose that the House of Lords were going back upon their previous decision. Apart from that, having since yesterday had an opportunity of considering Lord Loreburn's language carefully, I do not feel myself pressed with any difficulty. The facts were that the *Bellanoch* was lying in the mud. She went first full speed ahead and then full speed astern, but as to the latter, not for the purpose of driving herself astern, but for the purpose of a dredging or cleansing operation, to free her propeller from the mud. She put her engines astern not for any purpose of navigation astern, but for the purpose of getting her machinery into such a condition that it could be operated for the purpose of going ahead. Those being the facts, Lord Loreburn's words are these: "I think if she had done so"—that is, had given the sound signal—"it could not in this case have affected the collision."

(1) 13 App. Cas. 455, n. (2) [1891] A. C. 310.
(3) [1907] A. C. 269.

I do not think he meant by that that it could not in fact have affected the collision. I think what he meant was that the fact that the engines were from time to time going astern was a fact altogether irrelevant to the other vessel. The fact that the engines were going astern was a matter of no importance to the *Canning* to know, because it was not an operation which would result in any movement of the *Bellanoch* which would affect the manœuvres of the *Canning* in any way. When he says it could not have affected the collision I think he means that it was a matter wholly irrelevant for the purpose of whether the collision should happen or not. Then Lord Loreburn says, "The whistle could not have told him anything he did not know already." I think that by those words he meant that the whistle could not have told him anything material which he did not know already. If it told him anything its tale would have been that the ship was going astern, which she was not. That is the way in which I construe Lord Loreburn's words. I do not think that what was said in *The Bellanoch* (1) was intended to affect in the smallest degree that which was laid down in *The Fanny M. Carvill* (2) and deliberately adopted by the House of Lords in *The Duke of Buccleuch.* (3)

Having said that, I wish to say something about the facts in this case. The facts are that the *Malin Head* ported, gave a proper signal, and steadied. By steadying she abandoned the manœuvre of continuing to go to starboard, and decided to take from that point a rectilineal course. Upon the *Malin Head's* own evidence, having steadied she said to herself, "That other vessel is so manœuvring that I must make a further manœuvre to avoid collision, and I must put my helm hard-a-port," and she put her helm hard-a-port. It was a new manœuvre, because it was a manœuvre taken afresh for the purpose of escaping a difficulty in which a movement of the *Corinthian* was placing the *Malin Head.* She was adopting a new course in order to meet a new difficulty, and that, I think, was a new manœuvre. I by no means affirm that if a vessel puts her helm to port and then hard-a-port she is necessarily bound to blow

(1) [1907] A. C. 269. (2) 13 App. Cas. 455, n.
(3) [1891] A. C. 310.

C. A. 1909

THE CORINTHIAN.

Buckley L.J.

a port helm signal a second time; but here it appears to me that there was a new manœuvre, and the *Malin Head* was bound to give a second signal. She did not, and I think it follows that the vessel is to blame. Further I think she is to blame whether or not there was still sufficient time for the *Corinthian* to do something to avoid the collision. The statute intends to exclude dispute and evidence upon a dispute whether the collision was or was not inevitable. Apart from that we have received this answer from our assessors. We have put to them this question: "At the moment the *Malin Head* hard-a-ported was the collision inevitable?" Their reply is "Probable, but not inevitable." If that be so, the failure of the *Malin Head* to blow a blast was a matter which might have contributed, even if it did not contribute, to the collision. I, therefore, hold that the *Malin Head* is to blame. The other point is that the *Corinthian* says not only is the *Malin Head* to blame, but I am not to blame. On that point I agree with the other members of the Court that we cannot interfere with the decision of the Court below. I think both vessels must be held to blame.

Appeal allowed to extent of finding both vessels to blame. No costs in Court below or in Court of Appeal.

Solicitors for appellants (defendants): *Pritchard & Sons.*
Solicitors for respondents (plaintiffs): *Thomas Cooper & Co.*

T. L. M.

THE GERE.

1909
March 2, 3, 4.

Admiralty—Ship—Collision—River Thames—Overtaking and Overtaken Vessels—Keeping to the South of Mid-stream going down.

The plaintiffs' and the defendants' steamships, proceeding down the river Thames, came into collision, in the upper part of Galleon's Reach, owing in part to the defendants' vessel, which was leading, and which was to the southward of mid-channel, attempting, by starboarding, to pass to the northward of a dredger, moored in about mid-stream, thereby tending to throw herself across the course of the plaintiffs' vessel, which was coming down on the north side of the river, and also making to pass on the north side of the dredger. Both vessels were found to blame, the defendants' vessel, as the overtaken vessel, for not keeping her course, and the plaintiffs' vessel, as the overtaking vessel, for not stopping so as to keep out of the way of the defendants' vessel when she saw what that vessel was doing. As a matter of seamanship also both vessels were to be deemed in fault for disregarding the understanding on the river by which, for the safety of navigation, steamships going down keep to the southward of mid-stream, thereby leaving the northern side of the river free for vessels coming up.

Action of Damage by Collision.

The plaintiffs were the owners of the steamship *Brenda*.

The defendants, and counter-claimants, were the owners of the steamship *Gere*.

The case is reported with reference to an alleged understanding in the navigation of the river Thames, by which steam vessels going down keep to the southward, whilst upcoming steamships keep to the northward of mid-stream.

On November 15, 1908, about 6.30 A.M., the weather being overcast, the wind northerly light, and the tide the first of the ebb of from one to two knots, the *Brenda*, a screw steamship of 1152 tons gross register, a crew of sixteen hands, and carrying a duly licensed Trinity House pilot, left Stanton's Wharf, in the river Thames, and was proceeding down the river in the course of a voyage to Goole, exhibiting the regulation lights for a steamship under way, when, in the upper part of Galleon's Reach, under the circumstances detailed in the judgment, she came into collision with the *Gere*, a screw steamship of 754 tons gross register, a crew of fifteen hands, and carrying a duly

1909

THE GERE.

licensed Trinity House pilot, on a voyage from Nicholson's Wharf, London, to Penarth Dock in water ballast. She also was exhibiting the regulation lights for a steamship under way. As a result of the collision both vessels sustained damage, and the *Brenda* also came into collision with the dredger and the steamship *Milwaukee* mentioned in the judgment.

1909. March 2, 3, 4. *Aspinall, K.C.*, and *C. Robertson Dunlop*, for the plaintiffs, the owners of the *Brenda*.

Laing, K.C., and *Adair Roche*, for the defendants, the owners of the *Gere*.

BARGRAVE DEANE J. This is a case of a somewhat serious character, because of the consequence which will follow the decision I am about to give. It is true that it is only a case in which a collision between two ships is actually before the Court, but there are other consequences which evidently will result, and which therefore give me considerable anxiety.

The particular collision is between two smallish vessels, the *Brenda* and the *Gere*. Both vessels left wharves just below London Bridge, somewhere about the same time, in the early morning of November 15 last. The *Gere* left a little before the *Brenda*, and, starting from different sides of the river, they followed each other until they got somewhere down to Woolwich Reach. At that time the *Brenda* apparently was astern of the *Gere*, and therefore I must take it that she was in the position of an overtaking ship. Those in charge of the *Gere* have told her story of how she came down, but the Court does not believe the story of the *Gere* with respect to that matter. They say that they came down on the north side of the river all the way. The Court, upon the evidence, is of opinion that that is not a true story, because there was an abundance of independent evidence to shew that the *Gere* in fact, until very shortly before the collision, was following pretty well in the wake of a large steamer, the *Milwaukee*, which was being towed down to the southward of mid-channel. There is also the evidence from a vessel immediately astern of the *Gere*, a vessel called the *Ruby*, to the effect that the *Gere* was ahead of her and between her and

1909

THE GERE.

Bargrave Deane J.

the *Milwaukee*. Of course it is an awkward position for the Court to find itself in, namely, that it cannot believe the evidence of the *Gere* on a material point.

The facts as I believe them are as follows, and I agree with counsel for the plaintiffs that the question before the Court is almost entirely one of fact. There is one question which I have asked the Elder Brethren, because it is a matter which they are more competent to give me advice upon than I am to act upon my own judgment, though I entirely agree with them; but apart from that the question is one of fact.

The *Brenda* admittedly came down on the north side of the river to Woolwich Reach. The *Gere*, in my opinion, came down on the south side of mid-channel, in the wake of the *Milwaukee*. When they got somewhere about the free ferry in Woolwich Reach the *Gere* starboarded her helm, to come out from under the stern of the *Milwaukee*, for the purpose of passing that vessel. The *Gere* was going six or seven knots, and the *Milwaukee* about five knots, and according to the evidence of the pilot of the *Milwaukee*, he first noticed her when she got out on the port side. He says that at that time, when they were approaching the dredger, which was moored, according to the evidence, somewhere about mid-stream, he noticed that the *Gere* had the dredger on her port bow. Now that is a material piece of evidence. It is corroborated by a man on a sailing barge which was below the place of the collision, who says that before the collision, of which he was a witness, he saw both side lights of the *Gere*. There is also evidence that at that time the *Milwaukee* was making to pass somewhere about 100 feet to the southward of the dredger, and, according to the evidence of the plaintiffs, the *Gere* was observed to be making as though she would pass also to the southward of the dredger. It is said by those on the dredger that they had perceived that the *Gere* altered her course; that instead of passing to the southward she was seen to be making to pass to the northward. The man on the barge below says that at about that time he suddenly lost the red light of the *Gere*, which indicated to him that she was starboarding.

Now, those two vessels approached to the north side of the dredger. As I have said, the *Brenda* was the overtaking ship.

1909

THE GERE.

Bargrave Deane J.

The pilot of the *Gere* says that he did not change his mind. He says, "I never intended to pass to the southward of the dredger. I always intended to pass on the north side of the dredger. I was always on the north side of the channel." If one disbelieves his story as to being always on the north side, one hesitates to believe his story that he never intended to pass on the south side of the dredger. One doubts the whole of his story. If he was to the south side, then he must have intended to get across to the north side, and therefore there must have been an intention to get to the north. I am of opinion that he had an intention to get to the north, and that he did go to the north; but that does not bring about the collision. I believe that this vessel, the *Gere*, did intend to pass to the southward of the dredger, between the dredger and the *Milwaukee*, but that the person in charge of her had to change his mind for the very good reason—as I believe, and as the Elder Brethren advise me—that it was very doubtful whether there was room for the *Gere* to pass between the dredger and the *Milwaukee*. The dredger, as I have said, was about in mid-stream, and, according to the chart, there is about 600 to 700 feet between the dredger and the north shore. There were barges on the north side of the dredger, not close to her, but between her and the north shore, and therefore the distance to the north of the dredger available for navigation purposes was somewhat less than the full distance between the dredger and the shore. Now, I believe that the *Brenda* thought that the *Gere* had changed her mind and was intending to pass to the north side of the dredger. I do not quite follow from the evidence what distance there was—I rather think the *Brenda* says that there were about 100 feet between her and the dredger at the point at which she intended to pass the dredger. It is difficult in the early morning to gauge distances accurately, but putting it at something under 100 feet, then she saw this other vessel, the *Gere*, making towards her. In my opinion there was room for these two vessels to pass, both of them, to the north side of the dredger, but not too much room, and it was rather a hazardous proceeding for them both to do so; and the first finding of fact at which I arrive is that, in my opinion, as soon as the *Brenda* saw that the *Gere* was intending to come across to the north of the dredger she should

1909

THE GERE.

Bargrave Deane J.

at once have stopped her engines. She was an overtaking ship, and she had no business to press on and run the risk of not getting through. It was her duty to stop at once.

On the other hand I have to deal with the *Gere*, and to ask myself what really brought about this collision. If the *Brenda* had not pressed on there would have been no collision, but if the *Gere* had kept her course still there would have been no collision. In my opinion the *Gere* has not told the true story—I mean her officer and pilot—as to what happened on board her. I believe, upon the evidence given, that the *Gere* starboarded at a time when those on the *Brenda* say they saw she was starboarding. The evidence to my mind is conclusive upon that point. First of all it is sworn to by those on the *Brenda*, who saw it. Secondly, there is the man Hinton, who says that a few days afterwards he happened to meet the man Clarke, who had been at the helm of the *Gere*, and he says Clarke told him he had starboarded, and that he was surprised to get the order from the pilot of the *Gere*, but that he did get the order, and he obeyed it and starboarded. I have already referred to the evidence of the man on the sailing barge, who says he saw by the alteration of her lights that the *Gere* was starboarding. There is further the evidence of the pilot of the *Milwaukee*, who says that the original course of the *Gere* was to pass to the south of the dredger. Then there is the evidence of Clarke, who steered the *Gere*. Now he is a man who undoubtedly has not told the truth in the witness-box. Counsel for the defendants say "We see that is so, and we ask the Court to disregard his evidence altogether." I agree with them that he is not trustworthy, but still he has been in the witness-box, he has told his story, he has been cross-examined, and he has answered questions I put to him, and I take that part of his evidence which I believe to be true and not that which I believe to be false, and I look to see in what respect there is outside evidence to lead me to a conclusion as to what part of his evidence is true and what part is false. In chief he said "My helm was amidships. The order I got was 'Easy helm, hard-a-port.'" It at once struck me that "easy helm" must have meant ease it from something. You do not ease it from amidships. He stuck to it, but eventually

1909

THE GERE.

Bargrave Deane J.

he admitted that he had got an order to starboard, and that his helm was hard-a-starboard, and when he got an order to ease it and hard-a-port he understood it to mean "steady your helm from hard-a-starboard and put it hard-a-port." That I believe to be true. I believe it to be perfectly accurate that this vessel, at the time which is deposed to by the man on the barge and by those on the *Brenda*, did starboard her helm. Why the pilot did it I can only conjecture, but it may very well be that having altered his course he thought there was very little room, and in order to give more room to clear the dredger he starboarded.

I am of opinion that the *Gere*, being an overtaken vessel, had no right to starboard her helm at that time in order to change her course, and for that reason I think the *Gere* is also to blame. I think that this is a case in which the two vessels were making to pass to the northward of this dredger at a very dangerous place, and that each one is to blame; the overtaking vessel, for not stopping her engines at once, and the other, the overtaken vessel, is to blame for starboarding instead of keeping her course. They were both responsible partly for this collision.

It would not be right for me to leave this case without making a few more remarks. One has reference to the question I have put to the Elder Brethren. Witnesses have been called to say that they saw the *Gere* was sucked in towards the *Brenda*. This collision took place about half-past 6 in the morning, and the sun did not rise till 7.20, and although they may be perfectly honest witnesses, the opinion of the Court and of the Elder Brethren is that it is ridiculous to suppose that these people could have witnessed any such fact. Whatever they may have thought about it is one matter, but as evidence it is worthless.

The Elder Brethren also have a strong opinion that these steam vessels were both very much to blame for attempting to pass to the north of the dredger. There is an understanding that vessels in the river should keep to the starboard side, that is to say, vessels coming up should keep on the north, and vessels going down should keep to the southward. Here these two vessels were, before sunrise, getting over to that side of the river on which they might expect other vessels to be coming up, and they

1909

THE GERE.

Bargrave Deane J.

would have found themselves in an awkward position if they had met a steamer coming up. This collision would not have happened if they had both waited until they got below the dredger before they attempted to pass.

Both vessels to blame.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

THE YARMOUTH.

1909

July 12, 19.

Admiralty—Limitation of Liability—Shipping Casualty—Plaintiff Railway Company—"Owners"—"Actual Fault or Privity"—Affidavit of General Manager—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 59, *sub-s.* 2; *ss.* 503, 695, 719.

In an action of limitation of liability brought by a railway company, under s. 503 of the Merchant Shipping Act, 1894, against cargo owners and others to limit the liability of the plaintiff company as owners of a vessel lost at sea, the evidence of the plaintiffs was, by consent, taken by affidavit, and the plaintiffs relied on an affidavit made by the general manager of the company stating (inter alia) that the loss occurred without the "actual fault or privity" of the plaintiffs:—

Held by Bargrave Deane J., that the affidavit was sufficient and that it was made by the proper person.

ACTION OF LIMITATION OF LIABILITY.

The plaintiffs were the Great Eastern Railway Company, a company incorporated by Act of Parliament, and having its head office at Liverpool Street Station, in the city of London. The defendants were Faudels, Limited, and all and every person whomsoever claiming or being entitled to claim in respect of loss of life, goods, or merchandise on board the steamship *Yarmouth*.

By their writ issued April 6, 1909, the plaintiffs claimed "as owners of the late steamship or vessel *Yarmouth* of the port of Harwich to limit their liability to the aggregate amount of 15*l.* for each ton of the registered tonnage (with the addition of any engine room space deducted for the purpose of ascertaining that

1909

THE YARMOUTH.

tonnage) of the said steamship pursuant to the Merchant Shipping Acts, 1894 and 1906, in respect of loss of life or of loss of or damage to goods merchandise or other things arising from the loss of the said steamship *Yarmouth* on October 27, 1908, in the North Sea, and to have the amount of the plaintiffs' liability determined and distributed rateably among the several claimants."

By their statement of claim, delivered April 27, the plaintiffs alleged that:

"1. The plaintiff company was at the time of the loss hereinafter mentioned the owners of the British steamship *Yarmouth*.

"2. On the 27th October, 1908, the *Yarmouth* whilst on a voyage from the Hook of Holland to Harwich was lost with all hands.

"3. The said loss occurred without the actual fault or privity of the plaintiffs.

"4. The following action has been instituted in this Court against the plaintiffs as owners of the steamship *Yarmouth* claiming damages for loss of or damage to goods merchandise or other things arising from the said loss viz. on the 31st day of March, 1909, (number and folio stated) by the owners of a portion of the cargo lately laden on board the steamship *Yarmouth*.

"5. The plaintiffs have reason to believe that other claims may be brought against them in respect of loss of or damage to goods merchandise or other things arising out of the said loss.

"6. The registered tonnage of the steamship *Yarmouth* with the addition of any engine room space deducted for the purposes of ascertaining that tonnage according to the Merchant Shipping Acts 1894 to 1906 with regard thereto is 743·73 tons and no more.

"7. The claims in respect of loss of or damage to goods merchandise or other things arising from the said loss exceed the aggregate amount of 8*l.* per ton on the registered tonnage of the *Yarmouth* ascertained as aforesaid.

"The plaintiffs are willing and hereby offer to pay into Court the sum of 5949*l.* 16*s.* 10*d.*, being the aggregate amount of 8*l.* per ton on the tonnage of the steamship *Yarmouth* ascertained as

aforesaid together with interest thereon at 4 per cent. per annum from the date of the loss until such payment, and to give security for 5206*l.* 2*s.* 2*d.*, being the amount of 7*l.* per ton on the said tonnage together with interest thereon at 4 per cent. per annum.

"The plaintiffs claim:—

"1. A declaration that the plaintiffs are not answerable in damages in respect of loss of life or loss of or damage to goods merchandise or other things beyond the aggregate amount of 15*l.* for each ton of the said tonnage of the *Yarmouth*.

"2. A declaration that the registered tonnage of the *Yarmouth* with the addition of any engine room space deducted for the purpose of ascertaining that tonnage is 743·73 tons and no more and that the amount for which the plaintiffs are liable in respect of loss of life or loss of or damage to goods merchandise or other things is 11,155*l.* 19*s.* and no more.

"3. That the plaintiffs be allowed to pay into Court the sum of 5949*l.* 16*s.* 10*d.* and interest thereon from the date of the loss until such payment and be allowed to give security for 5206*l.* 2*s.* 2*d.* together with interest from the date of the loss until such payment and that upon such payment being made and such security given all further proceedings in the action aforesaid be stayed except for the purposes of taxation and payment of costs.

"4. A declaration that the plaintiffs are entitled to relief under the Merchant Shipping Acts 1894 to 1906 and the Judicature Acts against any other action or actions in respect of the said loss in the High Court of Justice and that the above named defendants and all and every person or persons whomsoever interested in the said steamship *Yarmouth* or the lives of those on board her or the goods merchandise or other things on board or having any right title claim or interest arising out of the said loss be restrained from bringing any action or actions in respect of the same against the plaintiffs in any Court other than the High Court of Justice.

"5. That all proper directions may be given by this Honourable Court for ascertaining the persons who may have any just claim in respect of loss of life or loss of or damage to goods merchandise or other things caused by the said loss.

1909

THE YARMOUTH.

"6. That the said sum may be rateably distributed among the several persons who may make out their claims thereto and that proper directions may be given for the exclusion of such claimants as shall not bring in their claims within a certain time to be fixed for such purpose."

By their defence, delivered May 26, the defendant cargo owners and others denied "each and every allegation in the statement of claim and especially the allegation in paragraph 3 thereof that the loss occurred without the actual fault or privity of the plaintiffs."

By consent, the evidence of the plaintiffs was taken by affidavit, and, in support of the application for limitation, the plaintiffs filed an affidavit made by John Francis Sykes Gooday, of Liverpool Street Station, in the city of London, general manager of the Great Eastern Railway Company, verifying the allegations contained in paragraphs 1 to 7 of the statement of claim and referring to a certified copy of the register of the plaintiffs' vessel.

It appeared that subsequent to the date of commencing the action for limitation the claims in respect of loss of life had been settled, so that, in effect, the limitation was sought against cargo claimants, all of whose cargo had been lost with the exception of some few packages which had been picked up at sea.

1909. July 12. *Aspinall, K.C.*, and *A. D. Bateson*, for the plaintiffs, asked for the usual decree of limitation of liability.

Lewis Noad, for the defendant cargo owners. The plaintiffs are not entitled to limit their liability. There is no statement as to how the casualty arose, no proof that the loss occurred without the privity of the plaintiffs, and no affidavit by the person referred to in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 59, sub-s. 2, as the "person to whom the management of the ship is entrusted by or on behalf of the owner."

The case stood over for the production of evidence by the defendants.

July 19. On behalf of the defendants, an official from the Board of Trade was called to produce the report, dated March 4, 1909, of the Court of inquiry which had investigated the circumstances attending the loss of the vessel, but, on production, the Court sustained the objection, taken by counsel on behalf of the plaintiffs, that the document was not admissible in evidence under ss. 695 and 719 of the Merchant Shipping Act, 1894, not being sealed with the seal of the Board of Trade or signed as provided by the Act.

The defendants then called Daniel Howard, whose name appeared on the register of the *Yarmouth* as managing owner, and who had in fact managed the vessel prior to her loss. He was also present during the inquiry instituted by the Board of Trade into the cause of the loss of the vessel; but his evidence was not taken for the reasons given in the judgment.

As to the meaning to be attached to the word "owner" in respect of liability, the following cases were referred to: *The Spirit of the Ocean* (1); *Meiklereid* v. *West* (2); *The Hopper No.* 66 (3); and as to the word "privity," *The Diamond.* (4)

BARGRAVE DEANE J. I am of opinion that this action should succeed, and that the plaintiffs are entitled to limit their liability.

The pleadings say that the *Yarmouth* was lost with all hands; that the loss occurred without the actual fault or privity of the plaintiffs; that an action has been instituted against the plaintiffs as owners of the *Yarmouth*, claiming damages for loss of or damage to goods; that the plaintiffs have reason to believe that other claims may be brought against them in respect of loss of or damage to goods, &c., arising out of the said loss, that is, as common carriers; that the tonnage of the ship ascertained according to the Merchant Shipping Acts was 743·73 tons, and the claims in respect of loss of or damage to goods, &c., exceed the aggregate amount of 8*l.* per ton; and that the plaintiffs are willing and offer to pay into Court the sum of 5949*l.* 16*s.* 10*d.*, with interest.

(1) (1865) Br. & L. 336.
(2) (1876) 1 Q. B. D. 428, at p. 435.
(3) [1908] A. C. 126.
(4) [1906] P. 282.

1909

THE YARMOUTH.

Bargrave Deane J.

That being so, it is quite clear that it is an admission that the plaintiffs are liable as common carriers for the loss of these goods, which they contracted to carry, and they say "Give us relief under s. 503 of the Merchant Shipping Act by limiting our liability to 8*l.* per ton." I understand there was loss of life, but that matter has been settled by the owners of the *Yarmouth.* Now, counsel for the defendants says "There is an admission of liability here from the fact that you ask for a limitation of liability." I agree with him that there is an admission of liability in the sense that as common carriers they failed to carry out their contract to carry these goods, but they say that liability is limited by s. 503. Now, the company cannot be protected unless the loss occurred without the actual fault or privity of the owners. The owners are the general body of shareholders of the company, and it has been decided that if the loss is occasioned by the actual fault of one of several part owners his co-owners are not thereby precluded from a right to the limited liability given by statute: *The Spirit of the Ocean.*(1) Therefore, here we must see whether it is clearly established in evidence that no co-owner was actually in fault in respect of or privy to the loss. Counsel for the defendants suggests—and attempts to prove it by putting in a document which I do not think is admissible in evidence, not being under the seal of the Board of Trade—that Mr. Howard was guilty of fault and privity which rendered the owners liable. Mr. Howard has been called on behalf of the defendants and has sworn that he is not an owner in the true sense of the word, but nothing but a paid servant of the company, managing their business at the port of Parkeston, near Harwich. As he is a paid servant, he is not an owner, and in order to bring Mr. Howard within the section as a person who is the owner and guilty of fault or privity you must shew that he owns shares; and he does not own a share. The section refers to the actual fault or privity of the owner, and not of "the owner or his agent or servant," and it seems to me it is not for me to read into the Act of Parliament words which are necessary to carry the argument raised by counsel for the defendants. Therefore I am of opinion that Mr. Howard is not an owner

(1) Br. & L. 336.

1909

THE YARMOUTH.

Bargrave Deane J.

within the meaning of the Act of Parliament. As I have said, the owners are the shareholders. Who is the person who represents the shareholders? Why, the general manager and secretary of the company. He is defined by law as being the proper person to make statements and affidavits and give evidence on behalf of the company. Mr. Gooday, the general manager, has made an affidavit, and that affidavit was the only evidence in the case up to the time this action came on. The defendants consented that the plaintiffs should be allowed to prove their case by affidavit, and Mr. Gooday has made a sufficient affidavit. Is he the proper person? As I have already said, I think he is the proper person. If counsel for the defendants did not accept his statement, he might have required an affidavit by some one else whom he could point out as being a more proper person to make it. He says it should have been made by Mr. Howard. I have already said that I think Mr. Howard was not the proper person to make it. For these reasons I am of opinion that the contention raised on behalf of the defendants cannot stand. The limitation must be granted, and any extra costs occasioned by the adjournment will not fall upon the plaintiffs.

Decree in favour of plaintiffs.

Solicitor for plaintiffs, the Great Eastern Railway Company: *E. Moore.*

Solicitors for defendants, Faudels, Limited, and others: *Waltons & Co.*

T. L. M.

1909

May 25, 26.

THE NADOR.

Admiralty—Ship—Collision—Fog—Sound Signal not heard—Negligence—Inevitable Accident.

The defendants' vessel, going down the river Thames, suddenly encountered fog, and, whilst proceeding to bring up, those in charge saw the riding light and heard the bell of the plaintiffs' vessel lying at anchor; but it was then too late to avoid a collision:—

Held, that the evidence failed to shew any negligence on the part of those in charge of the defendants' vessel in not seeing the light or hearing the sound signals sooner, and, therefore, on the ground of inevitable accident, the loss must rest where it fell.

Action of Damage by Collision.

The plaintiffs were William France Fenwick & Co., Limited, the owners of the *Monkwood*.

The defendants were the owners of the *Nador*.

On January 10, 1909, about 4.30 A.M., the weather being foggy, the wind westerly moderate, and the tide ebb of the force of nearly three knots, the *Monkwood*, a screw steamship of 1141 tons gross register, with a crew of seventeen hands, and engines of 179 horse power nominal, was lying at anchor, head on tide, some half-mile from the Sunk Light vessel in the course of a voyage from Sunderland to London, laden with a cargo of coals. Before coming to an anchor she had been sounding her whistle, and, at the material time, she was exhibiting her anchor lights and sounding her bell.

In these circumstances it was alleged by those in charge of the *Monkwood* that, after hearing the fog whistle of the *Nador*, they saw her masthead and green lights about 500 yards off, and about four points on the starboard bow; but that the *Nador*, instead of keeping clear, as she could and ought to have done, opened her red light and came on towards the *Monkwood*, and, as soon as it was seen that she could not clear, the windlass of the *Monkwood* was opened out and her engines put astern. The *Nador*, however, came on and struck the starboard bow of the *Monkwood* with her port side amidships, doing damage.

1909

THE NADOR.

The plaintiffs, the owners of the *Monkwood*, charged those on board the *Nador* with neglect in not keeping a good look-out, in not reversing her engines or letting go her anchor in time, and in not stopping her engines on hearing a fog signal forward of her beam.

The *Nador* is a screw steamship belonging to West Hartlepool, of 2031 tons gross register, a crew of twenty-three hands, and engines of 150 horse power nominal, and was on a voyage from Boujil and Mostaganem (both in Algeria) to Leith via London, with a cargo of locust beans. At the material time the *Nador* was about one mile to the north of the Sunk Light vessel steering N.E. b. N., when, the weather having suddenly closed in foggy, those in charge determined to anchor. The details as to the collision are fully set out in the judgment, but, shortly stated, were that those in charge of the *Nador*—which was coming round head to tide with engines working full speed ahead, and helm hard-a-port, making about three knots—saw the riding light of a steamer, which proved to be the *Monkwood*, almost ahead and about 150 yards distant, the steamer's bell being heard at about the same time. As the only chance of avoiding a collision, the engines of the *Nador* were kept working ahead, and the helm hard-a-port, but, just before the collision and with a view to ease the blow, the helm was put hard-a-starboard, and again hard-a-port, but the collision occurred, both vessels being damaged.

By par. 4 of the defence the defendants alleged that "the said collision was not caused by any neglect or default on the part of the defendants or their servants who used all reasonable skill and care and took all reasonable and proper precautions in the circumstances and so far as the defendants are concerned the said collision was an inevitable accident."

The defendants further said that (par. 6) "at and before the said collision the *Nador* was within a district within which pilotage is compulsory by law and was in charge of a duly licensed pilot by compulsion of law and if the said collision was due to the negligence of any person on board the *Nador* which the defendants deny the said collision was solely caused by the negligence of the said pilot and not otherwise."

1909

THE NADOR.

1909. May 25, 26. *Aspinall, K.C.*, and *A. D. Bateson*, for the plaintiffs, the owners of the *Monkwood*. It is submitted that the evidence establishes negligence on the part of those in charge of the defendants' vessel. The *Monkwood* had been at anchor some ten minutes before the collision, and had been regularly ringing her bell. Those in charge of the *Monkwood* heard the fog whistle of the *Nador*, and if those in charge of that vessel had been exercising reasonable care they would have heard the bell of the *Monkwood*. It lies on the defendants, who allege inevitable accident, to prove it, and they have failed to do so. In the case of *The Woodford* (1) a collision occurred in Santos Harbour on November 18, 1903, between the *Prinz Waldemar*, a steamship belonging to the Hamburg-American Line, and the steamship *Woodford*, of London. At the time the *Prinz Waldemar* was lying to her moorings, and the *Woodford* was proceeding out of harbour, bound for New York. In this Court the defence of inevitable accident, set up on behalf of the *Woodford*, was upheld on the ground that the collision was caused by the *Woodford* being struck by a pampero of great force. The Court of Appeal reversed this decision and found that those in charge of the *Woodford* had failed to exercise reasonable care. The House of Lords, in affirming the decision of the Court of Appeal, laid stress on the necessity for those setting up the defence of inevitable accident to make out a very strong case.

Laing, K.C., and *Southall*, for the defendants, the owners of the *Nador*. The evidence has failed to establish any want of reasonable care on the part of those in charge of the *Nador*. The collision occurred without any one being guilty of negligence, or if any one was to blame, it was the pilot alone. The question is one of pure fact, and the allegation that the bell of the *Monkwood* had been ringing eight or nine times before the collision is not consistent with the statements in the log book. Assuming that the bell was rung shortly before the collision, those in charge of the *Nador* may have been blowing their fog whistle at the same time, and, therefore, did not hear the bell till it was too late; at any rate no inference of negligence can be drawn from the fact that they did not hear the bell.

(1) *Shipping Gazette*, March 10, 1906.

1909

THE NADOR.

In the pleadings it is alleged that those in charge of the *Monkwood* saw the *Nador* at the distance of 500 yards, but the evidence as to the density of the fog contradicts this. In the case of *The Culgoa* (1) this Court upheld the defence of inevitable accident although the vessel which was run into was ringing her bell. The decision was reversed by the Court of Appeal, but the judgment of this Court was restored by the House of Lords.

THE PRESIDENT (SIR JOHN BIGHAM). In this case I think the loss must rest where it falls.

I am not satisfied that there was any negligence on the part of the *Nador*. That vessel had passed the Sunk Light in circumstances which, in my opinion, afforded no sort of warning that she was approaching a fog of the density which in fact appears to have been the case. There was nothing to lead those in charge to the conclusion that the proper course was then to anchor. They entered the fog suddenly, and then, and not till then, the proper course was to anchor. There was no negligence in what they did or omitted to do up to that time. When they entered the fog they realized that the only thing to be done was to bring the ship to an anchor, and they took the proper steps to do so. They took care to ascertain—what I am informed is the correct expression—that there was a clear eye. They did their best to ascertain that there was room and reasonable safety to perform the swinging manœuvre. We have been told that there was a vessel on their starboard side going in the same direction, and the *Nador* appears to have put her engines astern to get clear of the area of her evolutions. The helm was then put hard a-port and the engines full speed ahead, a proper step for effecting the operation they had determined upon—that is, to come to anchor. It was then that they realized that the *Monkwood* was lying at anchor; and the real point in the case is whether those in charge of the *Nador* were negligent in not having realized, by the use of their eyes or ears on the look-out, that the *Monkwood* was where she was. Several witnesses have sworn that in fact they did not realize the existence of the

(1) *Shipping Gazette*, April 28, 1894.

1909

THE NADOR.

The President.

Monkwood until they had commenced the manœuvre of bringing the *Nador* round under port helm.

I feel constrained to accept that evidence. I am advised that neither whistles nor bells can be absolutely relied upon where you have to take into account such disturbing elements as the wind and the noise of the engines. I do not know why the sounds of the *Monkwood's* whistle and her bell did not reach the ears of those on board the *Nador* before they did, but I am satisfied that the sounds did not reach them.

Counsel for the plaintiffs say that this is nothing more than an ordinary case of negligence; that the pilot and the master must have been grossly negligent; but here, where the *Nador* was in this fog—a thick and perhaps a dense fog—in circumstances when such men would be very likely to pay attention to and to hear sounds, if in fact they could be heard, I am satisfied that, for some reason which I cannot define, they did not hear the signals; and I do not attribute any blame to them for not hearing them. If they did not realize that the *Monkwood* was there, it is obvious that they could do nothing more than they did. When the bell was heard for the first time, the pilot attempted to improve the position by a momentary starboarding of the helm, but he realized that that change would produce no good effect, and might make matters worse, and he persevered, as I think he was right in doing, in keeping his ship on her port helm, in the hope that by so doing she would have enough way on to complete the turning operation with sufficient rapidity to escape the anchored *Monkwood*. He made a miscalculation in that, or rather his hopes were not realized, for we know that the *Nador* came into collision with the anchored vessel. It is suggested, as I understand, that he might have done better if, instead of persevering with his port helm and his engines full speed ahead, he had put his engines astern; but I am advised, and I agree, that if he had done that the position might, as counsel for the defendants suggest, have been aggravated for the worse, and, instead of receiving comparatively small damage, the *Monkwood* would have been most seriously injured amidships.

In these circumstances I do not think that I can find that this vessel, which was in the hands of, and under the control of, a

1909

THE NADOR.

The President.

compulsory pilot, was in any way negligent in what she did or omitted to do; nor can I say that the pilot was negligent. It appears to me that the whole thing was—I do not like to use the expression act of God, because it is not what I call an act of God at all—but it was an accident, a misfortune, which nobody could have avoided. Exercising reasonable care would not have prevented the accident happening. Reasonable care was exercised and did not prevent the accident.

Under these circumstances I think, as I have said before, that the loss must rest where it has fallen, and that this action must be dismissed. The defendants will have their costs.

Solicitors for plaintiffs, owners of the *Monkwood*: *Deacon & Co.*

Solicitors for defendants, owners of the *Nadór*: *Holman, Birdwood & Co.*

T. L. M.

In the Estate of MACKENZIE.

1909

Oct. 18.

Will—Destruction—Intention—Executors according to the Tenor—Universal Legatees in Trust—Form of Grant.

A testatrix by her will left all she possessed to two persons, P. and L., or the survivor of them, in trust to pay the whole income arising from her estate to her husband during his life, and at his death to realize the estate and divide the proceeds equally amongst her four children.

The will was retained in the possession of the testatrix, who on several occasions referred to it as if it were in force, and indicated where it would be found when wanted.

After her death the will was found in the place indicated, but it was in a number of fragments, all enclosed in a sealed envelope. The fragments, when pieced together, made up the complete document:—

Held (all parties consenting), that the will might be pronounced for; that, in the absence of a direction to pay debts, the trustees were not executors according to the tenor; but that, as, in their capacity of universal legatees and devisees in trust, their interest was paramount to that of the husband, the proper form of order to make would be to grant administration, with the will annexed, to them (P. and L.) as universal legatees and devisees in trust.

Motion for admission to probate of a destroyed will, or for a grant of administration with the will annexed.

1909

MACKENZIE, IN THE ESTATE OF.

Annie Bella Gay Mackenzie, the testatrix, died on May 28, 1909, at Chiswick, aged fifty, leaving her husband, Joseph Duke Mackenzie, surviving.

On July 31, 1907, she duly executed her will, which was in the following terms:—

"I Annie Bella Gay Pennycook or Mackenzie of Holmwood Burlington Lane Chiswick in the county of Middlesex do hereby declare this to be my last will and testament and I hereby revoke any former will or testament I may have executed and I hereby leave all that I possess to Frederick Stewart Pennycook of 8 Prebend Mansions Chiswick in the county of Middlesex and John Bolas Lane of the Boltons Grove Park Chiswick in the county of Middlesex or the survivor of them in trust for my husband Joseph Duke Mackenzie and they will pay to my husband the said Joseph Duke Mackenzie the whole income arising from my said estate during his lifetime and at his death the said estate shall be realised and divided equally amongst my four children. But should either of my said trustees be unable from any cause to act then I hereby empower them or the survivor of them to appoint either one or two fit persons to be their successors likewise having power to appoint successors so that the number of trustees may be two.

"As witness my hand this Thirty-first day of July One thousand nine hundred and seven.

"A. B. G. Mackenzie.

'L. Carter

"3 Hunt Street Chiswick.

"Helen MacMillen

"'Holmwood' Chiswick."

The said will was written out by Frederick Stewart Pennycook, a brother of the deceased, from a draft in the deceased's own handwriting.

The brother and husband of the deceased as well as other persons, besides the two attesting witnesses whose names appeared on the said will, were present at its execution.

After its execution, the will was retained by the deceased, being kept by her at her residence when she was at home, or taken with her when travelling.

After the death, the will was found by the deceased's husband and brother in a small envelope, which, together with her Post Office Savings Bank book and certain share certificates, was in a larger envelope, which was fastened down and sealed with wax and enclosed in a linen bag tied round with string. The deceased had told her husband that, when required after her death, her "papers" would be in the place where they were so found.

The will, as contained in the small envelope, was found in a number of pieces, which, when put together, formed the complete document as executed.

In conversation both with her brother and husband the deceased made occasional allusions to her will, but at no time did she intimate that it had been torn or revoked.

The estate consisted of both freehold and leasehold property, in the proportion of about one-third realty and two-thirds personalty, together of the net value of about 2150*l.*

The deceased left one son and three daughters, all sui juris. They all consented to the document being admitted to proof. Messrs. Pennycook and Lane, as executors according to the tenor, moved for probate, or, alternatively, that a grant of administration with the will annexed should be made to the husband, who joined with Messrs. Pennycook and Lane in the application.

H. Durley Grazebrook, in support of the motion. There is no evidence of intention to revoke, beyond what might be inferred from the fact that the will was found torn into fragments. The nearest case is *In the Goods of Thornton.* (1)

[BARGRAVE DEANE J. You need not labour that. On the facts before me, I am prepared to pronounce for the will.]

It is desired that probate should be granted to Messrs. Pennycook and Lane if the Court should hold that they are executors according to the tenor. It is true that there is no direction to them in the will to pay debts, but in some respects their position is stronger than was the case in *In the Goods of Kirby.* (2)

BARGRAVE DEANE J. I do not think I can hold the first two applicants to be executors according to the tenor; but, inasmuch

(1) (1889) 14 P. D. 82. (2) [1902] P. 188.

1909

MACKENZIE, IN THE ESTATE OF.

Bargrave Deane J.

as their interest under the will, as legatees in trust, exhausts the estate, in priority to the personal interest of the husband, I think the proper form of grant will be to Messrs. Pennycook and Lane, as universal legatees in trust, and I grant administration to them, in that capacity, with the will annexed.

Solicitor: *John R. Hall*

H. D. G.

1909
Oct. 25.

DAVISON *v.* DAVISON (THE KING'S PROCTOR SHEWING CAUSE; MONTGOMERIE INTERVENING).

Divorce—Practice—Costs—Wife's Petition—Decree Nisi—King's Proctor's Plea—Adultery of Petitioner—Intervention of alleged Adulterer—Withdrawal of Answers to King's Proctor's Plea—Motion to dismiss Petition—Petitioner and Intervener both condemned in Costs of King's Proctor—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 3.

Where a person, charged by the King's Proctor with having committed adultery with the petitioner, intervened and filed an answer to the King's Proctor's plea, such person, as well as the petitioner, was, upon the dismissal of the petition, condemned in the costs of the King's Proctor.

ON November 13, 1907, Janet Marguerite Davison, the petitioner, filed her petition for the dissolution of her marriage with George Davison on the grounds of his cruelty and adultery.

The suit was undefended, and a decree nisi was pronounced on June 16, 1908.

The King's Proctor filed his plea, shewing cause why the decree should not be made absolute, on the ground of the petitioner's adultery with William Edmonstone Montgomerie.

Particulars were applied for by the petitioner, and on February 18, 1909, the petitioner filed her answer, denying the allegations in the King's Proctor's plea.

On March 26, 1909, William Edmonstone Montgomerie obtained leave, under s. 3 of the Matrimonial Causes Act, 1907 (1), to intervene, and in due course filed his answer, denying the charges of adultery.

(1) The Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 3, is as follows: "In every case, not already provided for by law, in which any person is charged with adultery with any party to a suit, or in which the

1909

DAVISON v. DAVISON.

On May 22, 1909, witnesses were examined in Paris, under an order of the Court obtained for that purpose by the King's Proctor, with a view to proving certain charges in the plea.

The petitioner and intervener were represented by counsel on that occasion.

In the course of the proceedings the King's Proctor gave notice to the solicitor for the petitioner and intervener that he did not propose to proceed with certain other charges in the plea.

The case was duly set down for hearing.

On October 15, 1909, the petitioner's solicitor attended at the office of the King's Proctor and intimated that the petitioner and intervener desired to withdraw their answers to the King's Proctor's plea; and, upon a summons before the judge, an order was made on October 16, 1909, giving leave for the withdrawal of the answers, and the case was taken out of the defended list the question of costs being left to be dealt with on motion.

Notice of motion was duly filed and served, asking the Court to rescind the decree, to dismiss the petition, and to condemn both the petitioner and the intervener in the costs of the King's Proctor.

Hon. Victor Russell (*S. A. T. Rowlatt* with him), in support of the motion.

BARGRAVE DEANE J. made an order in terms of the notice of motion.

Solicitors: *The King's Proctor; T. Duerdin Dutton, for the petitioner and intervener.*

Court may consider, in the interest of any person not already a party to the suit, that such person should be made a party to the suit, the Court may, if it thinks fit, allow that person to intervene upon such terms (if any) as the Court may think just."

H. D. G.

1909
July 20.

[IN THE CONSISTORY COURT OF LONDON.]

THE RECTOR AND CHURCHWARDENS OF THE PARISH OF ST. MARGARET, LOTHBURY AND OTHERS *v.* THE LONDON COUNTY COUNCIL.

Ecclesiastical Law—Faculty—Faculty for Erection of Vestry on disused Burial Ground—"Enlargement of Church"—Disused Burial Grounds Act, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

The rector and churchwardens of a parish united with six other parishes in the city of London and the churchwardens of such six parishes petitioned the Ordinary for a faculty authorizing a choir vestry for the choir of the parish church of the united parishes and an extension of the clergy vestry of the same church being built on a disused burial ground adjoining the church, and to which the Disused Burial Grounds Act, 1884, applied; the choir vestry and extension of the clergy vestry to be placed close alongside the church and with a door leading into it. The grant of the faculty was opposed by the London County Council. It appeared in evidence that the existing accommodation for the robing of the choir was most inconvenient and unsuitable, and that there was no reasonable objection to the proposed extension of the clergy vestry; special services attended by very many clergy being held in the church, and members of the Corporation of London when attending the ordinary services robing in the clergy vestry. It further appeared that it was desired by the rector that the two vestries should be separated by a movable wooden partition, so that on occasions they might on the removal of the partition form one long room:—

Held, that the Court in its discretion would decree a faculty to issue for the erection of the choir vestry and the extension of the clergy vestry, but that a movable partition between them could not be sanctioned, as the two vestries when they formed one room—upwards of 50 ft. long and 26 ft. wide—would give much more accommodation than would be necessary for the clergy and choir to robe in when in attendance for the services of the Church.

Held, also, that what was authorized by the faculty was an "enlargement of the church" within the meaning of the 3rd section of the Disused Burial Grounds Act, 1884; that section providing that after the passing of that Act it shall not be lawful to erect any buildings upon any disused burial ground—defined to include any burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of certain Acts—except for the purpose of enlarging a church, chapel, meeting house, or other places of worship.

THIS was a cause of faculty instituted on behalf of the Reverend Prebendary Arthur John Ingram, the rector of the parish of St. Margaret, Lothbury, in the city and diocese of

1909

ST. MARGARET, LOTHBURY (RECTOR, &C.) v. LONDON COUNTY COUNCIL.

London, and of the parishes united therewith by Acts of Parliament and Orders in Council, videlicet St. Christopher le Stocks, St. Bartholomew by the Exchange, St. Olave Old Jewry, St. Martin Pomeroy, St. Mildred, Poultry, and St. Mary Colechurch; J. G. Nairne, churchwarden of St. Margaret, Lothbury, St. Christopher le Stocks, and St. Bartholomew by the Exchange; Wyndham Gibbes, churchwarden of St. Bartholomew by the Exchange; Joseph C. Dimsdale, churchwarden of St. Margaret, Lothbury; Edwin Freshfield, LL.D., and Edwin Fox, churchwardens of St. Olave Old Jewry; James Bell, churchwarden of St. Christopher le Stocks; William H. Thomas, churchwarden of St. Martin Pomeroy; J. R. Cooper and Charles T. Cuthbertson, churchwardens of St. Mary Colechurch; F. S. Wood, vestry clerk of St. Mildred, Poultry, and St. Mary Colechurch; and George L. Cooper and S. Fuller, churchwardens of St. Mildred, Poultry; and the cause was brought to obtain a faculty authorizing the erection on a disused burial ground adjoining the north side of the parish church of St. Margaret, Lothbury, of (1.) a choir vestry for that church, and (2.) an extension of the existing clergy vestry of the same; the buildings so to be authorized by the faculty to be erected alongside the north side of the church and with a door leading into it. The petition in the cause was, so far as material, in substance as follows:

That the several parishes following, namely, St. Margaret, Lothbury, St. Christopher le Stocks, St. Bartholomew by the Exchange, St. Olave Old Jewry, St. Martin Pomeroy, St. Mildred, Poultry, and St. Mary Colechurch, were united under Acts of Parliament in 1780 and 1840, and under the provisions of the Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), the last Order in Council completing the union at present existing was dated the 26th day of November, 1886, and was published in the *London Gazette* on December 17, 1886.

That the ecclesiastical necessities of the united parishes require that further accommodation for clergy, choir, and parish vestries and for Sunday school and for the catechizing of children and for general purposes for which a church may properly be used should be provided.

That the only available space for this purpose, there being

1909

ST. MARGARET, LOTHBURY (RECTOR, &c.) v. LONDON COUNTY COUNCIL.

only one church for the whole of the united parishes, is a piece of vacant land, part of the churchyard of the parish of St. Margaret, Lothbury, which adjoins the church on its north side between the north side of the church and the south side of Church Court.

That your petitioners have caused plans to be prepared for the enlargement of the said church by the erection of a building affording the required accommodation for the purposes aforesaid and beg to submit the same for consideration.

That access from and to the church will be as at present from the west end of the church, and a new means of access will be opened also at the east end.

The petition concluded with a prayer that the Court would be pleased to grant "a faculty to erect the aforesaid proposed enlargement of the church of the said united benefice for the purposes for which the same is required."

On February 10 last, subsequently to the filing of the petition, notice was given by the registrar to the solicitor for the London County Council of the institution of the suit and of the material contents of the above-mentioned petition (1), and thereupon an appearance was entered for the London County Council.

On May 20 last, upon the application of the solicitors for the petitioners, the Court, having heard counsel for the petitioners and counsel for the respondents, ordered that the petitioners have leave to amend the above petition by striking out the words "and for Sunday school and for the catechizing of children and for general purposes for which a church may be used" from the second paragraph thereof.

This amendment having been made in the petition, the solicitor for the London County Council on or about June 2 last brought in an amended answer which set out s. 3 of the Disused Burial Grounds Act, 1884, and referred to the Metropolitan Board of Works (Various Powers) Act, 1885 (48 & 49 Vict. c. clxvii.), and the Local Government Act, 1888 (51 & 52 Vict. c. 41), as the Acts under which the respondents were the authority for preventing the violation and for enforcing the due observance of the provisions of the Disused Burial Grounds Act, 1884,

(1) See *London County Council* v. *Dundas*, [1904] P. 1, at p. 16.

within the administrative county of London, and proceeded to allege in the third and fourth paragraphs thereof as follows:

"(3.) The churchyard of the church of the above-named parish is within the administrative county of London and is a disused burial ground within the meaning of the Act of 1884 above referred to.

"(4.) The new building proposed to be erected as described and shewn on the amended petition and the plans accompanying the same (1) and for which a faculty is asked is not a building for enlarging a church within the meaning of the Disused Burial Grounds Act, 1884, and is not a building authorized by that Act.

"It is not admitted that the ecclesiastical necessities of the united parishes require any further accommodation for clergy, choir, or parish vestries, and in any case the proposed building is much larger than such necessities, if they exist, require. It is in substance (except that it would occupy a somewhat larger area) a building similar to that shewn in the original plan deposited with the petition with some minor alterations of the internal arrangements and with a change of description from 'vestry lantern over' and 'proposed new church room' to 'choir vestry and clergy vestry.' The proposed building will be separated from the church except that means of communication are afforded by two doorways leading respectively into the church and into what is described in the plan as 'church porch now used as a clergy vestry.' It could not be used for the purpose of worship in the church except that the vesting and assembling of clergy and choir could take place there. The building is proposed to be erected on the disused burial ground mentioned in paragraph 3 of this answer."

The amended answer prayed that the Court would inquire into the above matters and refuse the faculty prayed for.

1909, June 23. The cause now came on to be heard before the Chancellor of the diocese of London (Dr. Tristram, K.C.).

The rector of St. Margaret, Lothbury, two others of the

(1) Two plans marked A and B, shewing the proposed erection described in the amended petition, were filed in the registry after the order made by the Court on May 20 last.

1909

ST. MARGARET, LOTHBURY (RECTOR, &C.) v. LONDON COUNTY COUNCIL.

petitioners, and another witness were examined in support of the amended petition. The result of their evidence is fully stated in the judgment.

It appeared that burials in the disused burial ground on which it was proposed to erect the choir vestry and the extension of the clergy vestry had been discontinued under an Order in Council of June 13, 1853, made in pursuance of the 15 & 16 Vict. c. 85.

Ernest Charles, for the petitioners. The suggestion made in the petition as originally filed, that the proposed buildings should be specifically built for the purpose of being used for Sunday school, for catechizing children, and for the general purposes for which a church may be used, has been abandoned, and the petitioners are now only asking for the erection of a choir vestry and the extension of the present clergy vestry, it being clear from the judgment of the Dean of the Arches in *London County Council* v. *Dundas* (1) that a faculty for buildings to be built for these last-mentioned purposes can lawfully be granted, though the proposed site is a disused burial ground within the Disused Burial Grounds Act, 1884, provided always that, as is the case here, the proposed vestries are not larger than are required for the convenient robing and unrobing of those who have to attend the services of the Church. The place where the choir robe at present—merely a passage—is most inconvenient, whilst, though the present clergy vestry may be sufficient for the use of the clergy who attend the ordinary services, the accommodation it affords is quite inadequate on the occasion of special services and at other times when very many clergy and others, as, for instance, members of the Corporation of London, use the clergy vestry for robing and unrobing.

Hansell and *Byrne*, for the London County Council. The buildings proposed to be erected under the sanction of the faculty are not buildings "for the purpose of enlarging a church" within the meaning of those words in s. 3 of the Disused Burial Grounds Act, 1884. (2) The uses to which the buildings in

(1) [1904] P. 1, at p. 23.

(2) 47 & 48 Vict. c. 72, s. 3. This section is as follows: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for

1909

ST. MARGARET, LOTHBURY (RECTOR, &C.) v. LONDON COUNTY COUNCIL.

question are to be put were disclosed by the petition as originally filed before it was amended, namely, as a church room and vestry for the catechizing of children and the holding of Sunday schools and the other purposes, other than the holding of religious services, to which a church may be properly put. Buildings cannot lawfully be erected for these purposes on a disused burial ground without infringing the Disused Burial Grounds Act, 1884. The proposed buildings would be useless as an enlargement of the church for the purpose of religious worship—that is, for the primary purpose for which the exception was allowed by the Act—and whatever may be the necessity for a moderate-sized room for the purposes of a choir vestry, no necessity exists for extending the clergy vestry.

Cur. adv. vult.

1909, July 20. DR. TRISTRAM. In this case the Reverend Prebendary Ingram as rector and the churchwardens of the parish of St. Margaret, Lothbury, in conjunction with the churchwardens of six other parishes in the city of London which had been united with the parish of St. Margaret, Lothbury, by Acts of Parliament passed in 1780 and 1840, and under the provisions of the Union of Benefices Act (23 & 24 Vict. c. 142), and by an Order in Council dated November 26, 1886, on an amended petition applied to the Court on June 23 last to grant a faculty authorizing them to erect a new choir vestry and to enlarge the existing clergy vestry for the convenience of the clergy and choir in the church of their parish.

Mr. Ernest Charles appeared as counsel for the petitioners, and in support of the application examined the rector of the parish, Dr. Freshfield, churchwarden of St. Olave Old Jewry, Mr. William Henry Thomas, churchwarden of St. Martin Pomeroy,

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the purpose of enlarging a church, chapel, meeting house, or other places of worship." The second section of the same Act provides that "in this Act, a disused burial ground, shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the provisions of the said recited Acts" (15 & 16 Vict. c. 85 and 16 & 17 Vict. c. 134). [This definition of "disused burial ground" given by the Disused Burial Grounds Act, 1884, is extended by the Open Spaces Act, 1887 (50 & 51 Vict. c. 32), s. 4.]

1909

ST. MARGARET, LOTHBURY (RECTOR, &c.) v. LONDON COUNTY COUNCIL.

Dr. Tristram.

and Mr. Henry Clarkson, of St. Mildred, Poultry, and they one and all were of opinion that it was absolutely necessary for the comfort and convenience of the choir, which consisted of twelve gentlemen and twelve boys, that there should be erected a choir vestry in substitution for a narrow passage, which was the only accommodation they had for robing for the choir. They proposed to erect this on a site in the churchyard on the north side of the church and to extend the clergy vestry further so as to adjoin it. Subsequently to the hearing of the case I inspected the church in the presence of the rector and a representative of the London County Council.

Mr. Hansell, who appeared as counsel for the London County Council, had suggested that there was no necessity to enlarge the existing clergy vestry, and that under the Disused Burial Grounds Act, 1884, the vestries should at least be limited to what was actually required for the convenience of the clergy and choir of the parish. It appeared by the evidence that in this church, which is one of great architectural beauty, the Golden Lectures since their institution had been delivered in Lent and after Easter, and that the Lord Mayor and Sheriffs and members of the Corporation of London were in the habit of occasionally attending the services in the church, their practice being to robe in the vestry; also that the officers and under officers and members of the Diocesan Church of England Lads' Brigade attended special services there, and that the chaplains of the London workhouses, amounting to from thirty to forty in number, also attended special services there and robed on such occasions. It also appeared in evidence that it was the only church in that part of the City that had a Sunday school class for children, which was attended by children from the adjoining parishes and which was held in the church.

The cost of erecting the new choir vestry and enlarging the clergy vestry will amount to 850*l*. This will be provided by the Charity Commissioners out of a fund held by them in trust for the parish. The plan for making these alterations in the church was prepared by the architect engaged by the rector and churchwardens and was submitted to the Charity Commissioners, who referred it to their architect, who approved of it, but suggested

1909

ST. MARGARET, LOTHBURY (RECTOR, &C.) v. LONDON COUNTY COUNCIL.

Dr. Tristram.

that there should be a slight addition made to the clergy vestry, and subject to this the Charity Commissioners have given their consent in writing to the plan being carried out.

On inspecting the church and the clergy vestry and the passage used for the choir to robe in, I consider the latter is most inconvenient and unsuitable for the purpose it is put to.

The evidence in support of the Court authorizing by faculty the erection of a new choir vestry and the extension of the clergy vestry in the manner proposed is most satisfactory. The rector of the parish, Dr. Freshfield, Mr. Thomas, and Mr. Clarkson all concur in the opinion of the necessity of having a proper choir vestry erected, and see no reasonable objection to the slight extension of the present clergy vestry, in which the Charity Commissioners and their architect also concur.

The granting of the faculty now asked for is in accordance with the rule laid down by Sir Lewis Dibdin in the Arches in the case of *London County Council* v. *Dundas* (1), in which he says: "The buildings authorized by the faculty are of two kinds. So far as they consist of choir and clergy vestries—that, is, moderate-sized rooms in which those who have to take part in the services may robe and unrobe—I do not think there can be any doubt that they are a mere enlargement of the church within the meaning of the Burial Grounds Act, 1884." (2)

The rector in his evidence suggested that it would be a convenience for parish purposes that the two vestries should be separated by a movable wooden partition, to enable them to be thrown into one room, when the rector considered it to be desirable that this should be done.

I am not prepared to sanction this being done by the present faculty, as it would make a room of upwards of 50 ft. in length and 26 ft. in breadth, a much larger room than would be necessary for the clergy and choir to robe and unrobe when in attendance for the services of the Church.

Mr. Ernest Charles has asked the Court whether a door may be placed in the partition between the vestries to give access

(1) [1904] P. 1.
(2) *London County Council* v. *Dundas*, [1904] P. 1, at p. 23.

1909

ST. MARGARET, LOTHBURY (RECTOR, &C.) v. LONDON COUNTY COUNCIL.

from one to the other, and to this the Court sees no objection. (1)

Solicitors for the petitioners: *Lee, Bolton & Lee.*
Solicitor for the London County Council: *Tanner.*

(1) The minute of the decree entered in the registry was in substance as follows: — "The judge having heretofore heard the evidence of the petitioners and counsel on behalf of the petitioners and counsel on behalf of the respondents and having inspected the church and churchyard of St. Margaret Lothbury in the city of London decreed a faculty to issue to the rector and churchwardens of the united parishes of St. Margaret Lothbury with St. Christopher le Stocks St. Bartholomew by the Exchange St. Olave Old Jewry St. Martin Pomeroy St. Mildred Poultry and St. Mary Colechurch to enlarge the church of St. Margaret Lothbury being the church of the said united parishes by the erection of a building affording accommodation for clergy choir and parish vestries upon a piece of vacant land being part of the churchyard of St. Margaret Lothbury which adjoins the said church on its north side between the north wall of the said church and the south side of Church Court with access from and to the church at the west end of the church as at present and a new means of access to be opened at the east end of the church in accordance with the amended petition and the plans marked A and B filed, subject to a substantial physical division being erected between the clergy and choir vestries with communication between them (if desired) by a door"; and the judge made no further order as to costs. [The costs of the respondents of and occasioned by the amendment of the petition and answer had been ordered to be borne by the petitioners.]

[An appeal was asserted against the above decree, but was not proceeded with.]

C. F. J.

[IN THE ARCHES COURT OF CANTERBURY.]

1909
Aug. 3.

THE OFFICE OF THE JUDGE PROMOTED BY THE BISHOP OF OXFORD *v.* HENLY. (Second Suit.)

Ecclesiastical Law — Criminal Suit by Letters of Request — Church Discipline Act, 1840 (3 & 4 *Vict. c.* 86), *s.* 13—*Proceedings by Default—Reservation of the Sacrament of the Supper of Our Lord—Disobedience to Monition—Contempt—Service not prescribed or appointed by Book of Common Prayer or sanctioned by the Ordinary—Monstrance—Litany addressed to the Virgin Mary—Service of Benediction with the Reserved Sacrament—Sentence of Deprivation ab officio et a beneficio.*

The incumbent of a parish church in a diocese within the province of Canterbury having been sued as defendant in a criminal suit by letters of request in the Court of Arches was pronounced by the Court to have been guilty of an ecclesiastical offence in that within two years past the sacrament of the Lord's Supper had been reserved by his authority in the parish church of which he was the incumbent, and that a light was kept burning before it, and thereupon the Court decreed a monition to issue against him, admonishing him to refrain in future from causing or permitting the reservation of the sacrament in his church either over the altar or elsewhere, and also from keeping burning or causing or permitting to be kept burning a light in front of the reserved sacrament. This monition was duly served on the incumbent, but was disobeyed by him, and subsequently another criminal suit by letters of request was brought against him in the Court of Arches. The amended articles in this second suit charged the defendant with having within two years past offended against the law ecclesiastical by—

(1.) on an occasion subsequent to that referred to in the previous suit reserving or causing or permitting to be reserved in his church upon or over the Communion table consecrated bread which had been consecrated at a celebration of the Holy Communion and not consumed and keeping or causing or permitting to be kept burning a light in front of it;

(2.) doing or causing or permitting to be done the same acts notwithstanding and in disobedience to the monition of the Court;

(3.) as a public service immediately after the service of evensong on a Sunday, in the presence of the congregation then assembled, exhibiting to them a monstrance containing the consecrated bread above mentioned, transferred there from the tabernacle in which it had been placed, this exposition of the consecrated bread being followed by hymns, versicles and responses, and a metrical litany to the Virgin Mary, and the service ending with a ceremonious benediction of the congregation with the consecrated bread contained in the monstrance; all such acts, ceremonies,

1909

OXFORD (BISHOP) v. HENLY,

and service being unlawful variations from the form and order prescribed by the Book of Common Prayer.

The incumbent did not appear to defend the suit, and the amended articles having been admitted to proof, the evidence of eye witnesses in support of the charges above referred to was given at the hearing, and evidence was also then given that the bishop of the diocese had not sanctioned any part of the acts, ceremonies, or service referred to in the amended articles, and that the light, tabernacle, and monstrance there mentioned had been introduced into the church without the sanction of a faculty.

The Dean of the Arches, being of opinion that the offences charged against the incumbent had been sufficiently proved, and that by the reservation of the consecrated bread with a light burning in front of it notwithstanding and in disobedience to the monition of the Court and the direction of the bishop the incumbent had been guilty of incorrigible contumacy, pronounced a sentence of deprivation depriving the incumbent ab officio et a beneficio.

IN this case, which came before the Court by virtue of letters of request signed and sealed by the Bishop of Oxford in the first instance under s. 13 of the Church Discipline Act, 1840, on March 27 last, and accepted by the Dean of the Arches on or about May 3 last, a decree by letters of request issued out of the registry on May 4 last calling upon the Reverend Oliver Partridge Henly (1), vicar of the church and vicarage of Wolverton St. Mary, in the county of Buckingham and diocese of Oxford, to appear and answer to certain articles, positions, or interrogatories in a criminal suit against him, and more particularly for having within two years last past, as it was suggested, offended against the laws ecclesiastical in the several matters specified in the letters of request; the articles to be administered at the promotion of the Bishop of Oxford.

The decree by letters of request was duly served on the defendant on May 11 last, but no appearance in the suit was entered on his behalf, and the proceedings were carried on in default.

The articles in the suit charging the defendant with having offended in the matters specified in the letters of request were dated May 19 last, and, having been filed, were with some amendments admitted to proof on June 14 last. The amended

(1) For previous proceedings against Mr. Henly in the Court of Arches see *The Office of the Judge promoted by the Bishop of Oxford* v. *Henly*, [1907] P. 88.

articles were, so far as material to this report, in substance as follows:

1. [Pleaded that by the 13 & 14 Car. 2, c. 4, and the Acts thereby confirmed and applied, the Clerical Subscription Act, 1865, and Canons 14, 36, and 38 of the Canons of 1603 amended by the Canons of 1865, all clerks and ministers in holy orders are, amongst other things, bound to say and use the Book of Common Prayer and Administration of the Sacraments and other rites and ceremonies of the Church according to the use of the Church of England, and not to use any other rite, ceremony, order, form, or manner of celebrating of the Lord's Supper or matins or evensong or other open prayers than is mentioned and set forth in the said book or may lawfully be used by the permission of the Ordinary, and any clerk or minister in holy orders offending against the said statutes, constitutions, and canons (save in so far as the same or any of them have been affected or modified by certain provisions in the statutes 34 & 35 Vict. c. 37 and 35 & 36 Vict. c. 35, none of which provisions apply to any of the practices, matters, or things in the following articles mentioned and objected against the said defendant) ought to be punished according to the gravity of his offence and the exigency of the law.]

2. By the aforesaid Book of Common Prayer every priest of the Church of England celebrating the Holy Communion is bound, immediately after the blessing, himself with such other communicants as he shall call unto him reverently to eat and drink any that may remain of the bread and wine consecrated at such celebration of the Holy Communion, and by the said book, statutes, constitutions, and canons and by the twenty-eighth Article of Religion it is unlawful to reserve or keep after the service of Holy Communion ended any of the bread and wine consecrated at such service, and by the twenty-fifth Article of Religion it is stated that the sacraments were not ordained of Christ to be gazed upon or to be carried about.

3. [Pleaded that the defendant was and is a priest of the Church of England and at all material times was the lawful vicar and incumbent of the church and parish of Wolverton St. Mary.]

1909

OXFORD (BISHOP) v. HENLY.

4. On Monday, December 10, 1906, Sir Lewis Tonna Dibdin, Official Principal of the Arches Court of Canterbury, duly proceeding in a certain cause of office brought in virtue of letters of request from the Bishop of Oxford against the defendant in the present suit for having offended against the laws ecclesiastical by (inter alia) reserving unconsumed in the church of Wolverton St. Mary part of the bread and wine consecrated at celebrations of the Holy Communion in the said church and not consuming or causing to be consumed such consecrated bread and wine at such celebrations immediately after the blessing, did, by his interlocutory decree, decree that the said defendant had been guilty of an ecclesiastical offence in that within two years then last past, videlicet on December 27, 1905, the Blessed Sacrament was reserved by the authority of the defendant in Wolverton St. Mary church above the altar, and that a light was burning before it, contrary to the laws, constitutions, and canons ecclesiastical of the Church of England, and did decree a monition to issue against the said defendant to refrain in future from offending in like manner, and on December 17, 1906, such monition under seal dated December 10, 1906, was accordingly served on the said defendant, admonishing him to refrain from causing or permitting to be kept in his church either over the altar or elsewhere bread and wine which had been consecrated at a celebration of the Holy Communion and not consumed at or immediately after such celebration, and also from keeping burning or causing or permitting to be kept burning a light in front of the said bread and wine, under pain of the law and contempt thereof.

5. On Sunday, January 10, 1909, the defendant kept or caused or permitted to be kept in the church of Wolverton St. Mary, upon or over the holy table, part of the bread which had been consecrated at a celebration of the Holy Communion and not consumed at or immediately after such celebration.

6. The defendant kept or caused or permitted the said consecrated bread to be kept as in the preceding article mentioned notwithstanding and in disobedience to the monition in the fourth article mentioned.

7. On Sunday, January 10, 1909, the defendant kept burning or caused or permitted to be kept burning a light immediately

in front of the consecrated bread in the two preceding articles mentioned.

8. The defendant kept the light burning or caused or permitted it to be kept burning as in the preceding article mentioned notwithstanding and in disobedience to the monition in the fourth article mentioned.

9. On Sunday, January 10, 1909, immediately after the conclusion of the service of evensong, and in the presence of the congregation then assembled, the defendant, who had been officiating thereat, solemnly and ceremoniously, being vested in a cope, and accompanied by two acolytes and a thurifer, removed the consecrated bread which he had kept or caused or permitted to be kept upon or over the holy table as in the fifth and sixth articles mentioned from a case or tabernacle standing upon or over the said holy table, in which case or tabernacle it had been so kept, and placed it in a brass or gilt vessel or monstrance so constructed that the consecrated bread so placed within it was visible. This vessel or monstrance was then placed by the defendant above the case or tabernacle so that the consecrated bread contained therein was visible to the congregation. This exposition of the consecrated bread was followed by (1.) a hymn and some versicles and responses; (2.) a metrical Litany addressed to the Blessed Virgin, the verses of which were sung alternately by the defendant and the congregation; (3.) some further versicles and responses, some collects, and another hymn. There then followed a solemn and ceremonious benediction of the congregation by the defendant with the said consecrated bread contained in the said vessel or monstrance.

10. All the said acts, ceremonies, and service in the preceding article mentioned were performed as a public service in the presence of the congregation, and no part of the acts, ceremonies, or service in the preceding articles mentioned had been sanctioned by the promoter, and the said light, tabernacle, and monstrance had been introduced into the church without the sanction of a faculty.

11. All the acts, ceremonies, and service set forth in the ninth article were unlawful variations from the form and order prescribed and appointed by the Book of Common Prayer and

1909

OXFORD (BISHOP) v. HENLY.

Administration of the Sacraments and other rites and ceremonies of the Church, and were contrary to the statutes and to the constitutions, canons, and articles in the first and second articles mentioned.

12. The defendant by reason of his having committed the several offences set forth in the fifth, sixth, seventh, eighth, and ninth articles did thereby offend against the laws, constitutions, and canons ecclesiastical, and by reason of his having committed the several offences set forth in the sixth and eighth articles was guilty of contumacy and contempt of the said Court of Arches and of the jurisdiction thereof, and of incorrigibleness and obstinate disobedience to the Church.

13. [Pleaded that by reason of the letters of request having been duly presented and accepted, and of the premises, the defendant was subject to the jurisdiction of the Court.]

The articles concluded with a prayer that on proof of the premises so far as in law shall be necessary the Court would be pleased to pronounce that the said O. P. Henly had offended against the law in the particular matters hereinbefore alleged, some one or more, or all of them, and to decree that the said O. P. Henly shall be deprived ab officio et a beneficio or be otherwise duly and canonically punished and corrected according to the exigency of the law, and to condemn the said O. P. Henly in the costs of this suit. (1)

July 19, 1909. The cause now came to be heard before the Dean of the Arches (Sir Lewis Dibdin, D.C.L.).

The defendant was thrice called into Court, but did not appear either in person or by solicitor or counsel.

Oral evidence in proof of the articles was given by the Reverend Cecil F. J. Bourne, Archdeacon of Buckingham, and the Reverend H. N. Perrin, chaplain to the Bishop of Oxford, who were present in the church of St. Mary, Wolverton, on the evening of Sunday, January 10 last, and eye witnesses of the matters described in the

(1) The articles were served personally on the defendant on May 21 last, and as amended and admitted to proof they were again personally served on him on June 23 last.

articles as occurring on that evening. A full statement of the evidence of these witnesses and of the contents of certain letters from the promoter to the defendant dated January 1, 1907, February 25, 1907, January 23, 1909, and February 9, 1909, appears in the judgment of the Court. (1)

The promoter was called as a witness and gave evidence that he had not sanctioned any of the ceremonies or service described in the articles, and the registrar of the diocese of Oxford proved that the faculty books of the diocese had been searched for twenty-five years back, but no faculty had been found sanctioning the introduction into the church of St. Mary, Wolverton, of the tabernacle, monstrance, or light referred to in the articles.

Talbot, K.C., and *A. B. Kempe*, for the promoter. The evidence before the Court clearly shews that the defendant has disobeyed the monition of the Court served on him in the previous suit, and that he has offended against ecclesiastical law in the matters set forth in the articles, and in these circumstances no lighter sentence ought to be passed on him than a sentence of deprivation ab officio et a beneficio.

Cur. adv. vult.

July 20, 1909. THE DEAN OF THE ARCHES. This is a case the gravity of which is much greater than its difficulty. The defendant is beneficed at Wolverton, in the diocese of Oxford. In or about December, 1905, it came to the bishop's knowledge that on the 27th of that month, during a funeral service held in Wolverton parish church, the sacrament, contained in a tabernacle and having a lamp burning before it, was reserved over the altar. The bishop entered into communication with the defendant. It appeared that the defendant had for many months adopted the practice of habitual reservation in the manner I have described. The bishop, first informally and then formally and in writing, required him to abandon this practice.

(1) Secondary evidence was given of these letters, as the defendant, though served with a notice to produce them as well as a compulsory containing a clause as to production of documents, failed to produce the originals.

1909

OXFORD (BISHOP) v. HENLY.

The Dean of the Arches.

The defendant entirely refused to comply with the bishop's direction, on the ground that he (the defendant) had never disobeyed the rubrics, which in his opinion do not affect the practice of reservation for the sick, and that therefore the bishop's demand was one he had no right to make. The bishop then promoted a suit in this Court, at the trial of which the facts I have stated were proved. The defendant failed to appear. I considered and entered into a full statement of the law of the Church of England, as I understand it, with regard to reservation, and I found that the defendant had been guilty of an ecclesiastical offence by causing the Blessed Sacrament to be reserved on the particular date named, above the altar of his church, with a light burning before it. Although his letters indicated, as I have said, a much more persistent breach of the law, I did not feel at liberty on the pleadings and evidence before me to go further, and I merely monitioned the defendant not to repeat his offence. (1) This monition was duly served on December 17, 1906. From that date the defendant's misapprehensions as to the legal effect of the rubrics cannot be justly pleaded in palliation of his conduct. Even if the matter had been fairly open to more doubt than, in my opinion, it ever was, when the case had been argued and decided in the Provincial Court, duty required that the defendant, whatever his previous opinion, should conform to the law so declared. The defendant, however, gave no sign of submission. He left unanswered and unacknowledged two letters which the bishop addressed to him, asking whether the monition had been complied with and warning him of the inevitable consequence of non-compliance. Later on the bishop called at the defendant's residence in the hope, as he told the defendant, that he might do some good by a personal visit. But the defendant absolutely declined to discuss the matter or to say anything about it. So far as the evidence before me goes, nothing further seems to have happened until Sunday, January 10, 1909, when, at the request of the bishop, the Archdeacon of Buckingham and the bishop's chaplain, the Reverend H. N. Perrin, attended evening service

(1) See *The Office of the Judge promoted by the Bishop of Oxford* v. *Henly*, [1907] P. 88.

at Wolverton church. It appears from their evidence that a tabernacle was still placed above the altar, with a lamp burning before it, just as it had been before the former proceedings were begun. The defendant preached a sermon in which he made very grave statements as to the change effected, as he said, by "transubstantiation," in consequence of which the bread and wine after consecration were no longer bread and wine, but the body and blood of Christ, and so proper objects of worship wherever present. Both witnesses are certain that the word "transubstantiation" was used, but in other respects do not profess to quote the defendant's exact words, which, it would seem, were not read from a manuscript, but spoken. When the ordinary evening service was completed a hymn was sung, a voluntary was played on the organ, and books were distributed to the congregation who remained in their places. The defendant, who during the singing of the hymn had retired to the vestry, reappeared vested in a cope and attended by two acolytes and a thurifer. He advanced to the altar, on and around which many lights had been placed, and, standing before it, opened the tabernacle and appeared to transfer something from it to a vessel with glass sides, called a monstrance. He then placed the monstrance on the top of the tabernacle, so that it was in the full view of the congregation (who were now kneeling), and the witnesses clearly saw through the glass sides of the monstrance a round white object, which they supposed to be a wafer. The defendant then knelt before the altar and, having received a censer from the thurifer, censed towards the monstrance. The service which followed was taken from the book, copies of which had been distributed, and was therein described as Benediction of the Sacrament. It began with an English translation of the hymn "O salutaris Hostia" and certain versicles and responses. A Litany of the Blessed Virgin followed. It was apparently an English translation of a well-known Roman Catholic devotion and contained this verse:

> "Holy Mary, Mother blest
> Of the everlasting God,
> Of all virgins holiest,
> Pray for us poor sinners."

1909

OXFORD (BISHOP) v. HENLY.

The Dean of the Arches.

This was followed, after a versicle, response, and the collect for the Annunciation, by two verses of the hymn "Tantum ergo sacramentum" in an English translation, and finally by the collect "Deus qui nobis" in English. The only part of the service to be found in the Prayer Book was the collect for the Annunciation. When these prayers were ended, a large gold-coloured cloth or humeral was placed over the shoulders and arms of the defendant, still kneeling before the altar. Thus vested, he rose, and, taking the monstrance into both his hands, turned and held it up, facing the people. Next, lowering it, he turned and presented it first towards the south, then towards the north, and finally, turning to the altar, placed the monstrance thereon. The defendant was seen to open the tabernacle, and the witnesses inferred from his movements that he took the wafer out of the monstrance and replaced it in the tabernacle, which, when he moved away, was seen to be closed. The defendant then retired and the congregation dispersed.

I need not say that the service I have described is an accurate reproduction of the modern Roman Catholic service known as "Benediction with the most Blessed Sacrament." It is impossible to come to any other conclusion than that a consecrated wafer was contained in the monstrance and that the defendant has repeated his former offence of permitting the sacrament to be reserved in his church, and I find as a fact that he has done so. But in addition, although his original defence was that he was reserving for the sick, he is now found employing the reserved sacrament for quite other purposes—purposes not only undoubtedly illegal, but also alien to the ritual and subversive of the teaching of the Church of England. It may safely be assumed that it was the danger of this kind of misuse of holy things which in the first Prayer Book prompted the rigorous limitation of communion and in the second led to the total abolition of communion apart from celebration.

The defendant has disobeyed the monition in a manner which has greatly aggravated his offence. But independently of his wrong-doing in this respect he has been guilty of a serious breach of the law by the public use in his church of the ceremonies and service I have described. They are not only

1909

OXFORD (BISHOP) v. HENLY.

The Dean of the Arches.

unlawful as variations from the ceremonies, order, and form of open prayer set forth in the Prayer Book, but are incompatible with loyal adherence to them. The defendant's responsibility is certainly not diminished by the fact that he never even sought to obtain his bishop's consent to the use of the ceremonies and service in question. But in saying this I must not be understood to imply that the exercise of any authority of the bishop, either inherent in his office or conferred by statute, could have made the defendant's acts lawful or have availed to dispense him from liability to censure on account of them.

On learning what had occurred the bishop wrote two letters to the defendant dated respectively January 23 and February 9, 1909. In the first he gave the defendant an opportunity of resigning his benefice, and in the second the bishop notified the defendant that these proceedings were imminent. The defendant left both letters unanswered and unacknowledged.

The bishop then promoted the present suit. Again the defendant has not appeared. The articles in effect charge three offences, namely, (1.) repetition of reservation, (2.) the use of unlawful ceremonies, (3.) contumacy, and they ask that the defendant may be deprived of his benefice on the ground that he is incorrigible.

I am prepared to declare that the promoter has sufficiently proved the articles, and in the absence of any withdrawal from the attitude of self-will and obstinate contumacy which he has hitherto maintained I have no doubt that the defendant must be sentenced to deprivation. The original offence was grave. It has been repeated deliberately, with many incidents of aggravation, and another and distinct offence has been committed. The defendant has refused to listen to the fatherly advice of his bishop and he has disregarded both his Lordship's definite and reiterated directions and also the sentence and monition of this Court. I need not repeat what has been said in previous cases with regard to the sentence of deprivation. It is the censure reserved for offences which either from their essential gravity or from the incorrigible persistence of the delinquent cannot be adequately dealt with by a lighter sentence. I regret to say that the present case seems to be one of this class. I shall not,

1909

OXFORD (BISHOP) v. HENLY.

The Dean of the Arches.

however, finally dispose of it to-day, but shall do as I did in the proceedings a few years ago against Mr. Fillingham. (1) I shall adjourn the further hearing until this day fortnight, with an intimation that unless something occurs in the interval to alter very materially Mr. Henly's position both towards his bishop and towards this Court—something I mean which satisfies me that he is not after all incorrigible, but is bona fide prepared not to repeat the offence which led to his being monitioned—I shall on that day pronounce sentence of deprivation on the defendant and condemn him in the costs of these proceedings.

Aug. 3, 1909. The adjourned cause was called on before the Dean of the Arches.

Kempe appeared for the promoter and examined as a witness in the cause a clerk employed by the solicitors for the promoter. This witness stated that since the adjournment of the suit he had served on the defendant a certified copy of the judgment delivered by the Dean of the Arches on July 20 last.

The defendant was then thrice called into Court, but did not appear either in person or by solicitor or counsel.

Kempe porrected a sentence of deprivation (2) and prayed that the Court would pronounce the defendant contumacious and pass on him sentence of deprivation ab officio et a beneficio and condemn him in costs.

THE DEAN OF THE ARCHES, himself and all other persons present in Court standing, read aloud the following sentence of deprivation depriving the defendant ab officio et a beneficio :—

In the name of God, Amen. Whereas there is depending in the Arches Court of Canterbury by virtue of letters of request from the Right Reverend Father in God Francis by Divine permission Lord Bishop of Oxford a cause of our office promoted by the said Lord Bishop of Oxford against the Reverend Oliver Partridge Henly clerk in holy orders the lawful perpetual curate or vicar

(1) See *The Office of the Judge promoted by the Bishop of St. Albans* v. *Fillingham*, [1906] P. 163.

(2) This sentence had been previously submitted to the Dean of the Arches in chambers.

1909

OXFORD (BISHOP) v. HENLY.

The Dean of the Arches.

of the church and parish of Wolverton St. Mary in the county of Buckingham and diocese of Oxford and province of Canterbury in which the said Reverend Oliver Partridge Henly has been by lawful citation in that behalf convented to answer to certain articles heads positions or interrogatories touching and concerning his soul's health and the lawful correction and reformation of his manners and excesses and more particularly for having within two years before the commencement of the said cause offended against the law ecclesiastical as therein fully stated which said articles were duly exhibited against him in the words and figures following:—[The Dean of the Arches read from the sentence the amended articles in the cause, and continued:—]

And whereas the said articles were duly given exhibited objected and admitted in the said cause and the same and a true copy thereof were duly served upon the said Reverend Oliver Partridge Henly and he was duly required to answer the same but wholly failed and omitted so to do and did not appear to the said citation and did not either by himself or his proctor in that behalf attend the hearing of the said cause or offer any evidence therein though he had due notice of the time and place when and where the same would be heard and was thrice called into Court but was contumaciously absent.

And whereas we Lewis Tonna Dibdin Knight Doctor of Laws Official Principal of the Arches Court of Canterbury lawfully constituted rightly and duly proceeding in the said cause and having seen heard and understood and rightly and maturely discussed the merits and circumstances and diligently searched into and considered the whole proceedings had and done therein and observed all and singular the matters and things that by law ought to be observed and having heard the evidence and also counsel on behalf of the said promoter (the said Reverend Oliver Partridge Henly having been duly cited and having received due notice of all the proceedings and having been thrice called in Court but in nowise appearing) do hereby decree pronounce and declare that the proctor for the promoter has sufficiently proved the articles given exhibited objected and admitted in the said cause.

Therefore the said Lord Bishop of Oxford being lawfully

1909

OXFORD (BISHOP) v. HENLY.

The Dean of the Arches.

before us in Court (the said Reverend Oliver Partridge Henly being contumaciously absent) and the said Lord Bishop of Oxford having prayed that sentence may be delivered and [justice] done: We the said Lewis Tonna Dibdin having first ourselves diligently examined the whole and every part of the proceedings and the said several offences proved exacting by law deprivation of ecclesiastical promotions have thought fit to pronounce and do accordingly hereby pronounce decree and declare that the said Reverend Oliver Partridge Henly clerk by reason of the premises and for and on account of his said several offences ought by law to be deprived of all his ecclesiastical promotions within the province of Canterbury and especially of the perpetual curacy or vicarage of the church and parish of St. Mary Wolverton and of all profits and benefits of the said perpetual curacy or vicarage and of any other ecclesiastical promotions within the province of Canterbury whereof he may be possessed and of and from the glebe fruits, tithes, rents, salaries and all other ecclesiastical dues rights and emoluments whatsoever belonging and appertaining to his said ecclesiastical promotion or any other ecclesiastical promotions within the said province of Canterbury whereof he is possessed and we do deprive him thereof accordingly by this our definitive sentence or final decree which we read and promulge by these presents And we do also condemn the said Reverend Oliver Partridge Henly in the lawful costs made and to be made in the said cause on the part and behalf of the said Lord Bishop of Oxford the promoter of these presents.

The Dean of the Arches then signed the sentence, which was engrossed on parchment, writing the word "justice" therein, printed above in brackets, in his own handwriting. He further directed that a copy of the sentence should be transmitted to the Consistory Court of Oxford. (1)

Solicitors for the promoter: *Day & Son.*

(1) The minute of Court in the Act Book was, according to the practice, signed in the margin by the counsel for the promoter and others present in Court as witnesses (a member of the Bar and the registrar of the diocese of Oxford).

C. F. J.

THE TRYST.

1909
Oct. 21, 22, 26.

Admiralty—Ship—Collision—Failure to stand by—Statutory Presumption of Fault—Proof to the contrary—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 422, *sub-ss.* 2, 3.

In an action of damage by collision, in which those in charge of the defendants' steam vessel were found alone to blame, it appeared that the plaintiffs' vessel and the defendants' vessel, after the first contact, fell alongside, and, whilst clearing, the port propeller of the plaintiffs' vessel struck the starboard side aft of the defendants' vessel, under water, with the result that the defendants' vessel sank in a couple of hours; but it was not known to those in charge of either vessel at the time of the impact that the damage was so serious. The plaintiffs' vessel did not stop, but those in charge hoisted flag signals asking if any assistance was required, and, only hearing long blast whistle signals from the defendants' vessel, they steamed away:—

Held that, though those in charge of the plaintiffs' vessel suspected that damage might have been done by the port propeller, and though the blowing of the whistle on the defendants' vessel ought to have conveyed to the minds of those in charge of the plaintiffs' vessel that assistance was needed, still the collision could not be deemed to have been caused by the wrongful act, neglect, or default of the master of the plaintiffs' vessel, as "proof to the contrary" had been given within the meaning of s. 422, sub-s. 2, of the Merchant Shipping Act, 1894, and the further question whether the master had been guilty of a misdemeanour did not arise, for sub-s. 3 of the same section dealt only with the personal liability of the master, so that the liability of the ship or of her owners was not affected.

Action of Damage by Collision.

The plaintiffs were the Royal Mail Steam Packet Company, owners of the *Ortona*.

The defendants were the owners of the *Tryst*.

The case is reported on the question of the effect of the words "in the absence of proof to the contrary" in s. 422, sub. s. 2, of the Merchant Shipping Act, 1894. (1)

(1) 57 & 58 Vict. c. 60, s. 422:

"(1.) In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel crew and passengers (if any),

"(*a*) to render to the other vessel her master crew and passengers (if any) such assistance as may be practicable, and may be necessary to save them from any danger caused by the collision, and to stay

1909

THE TRYST

On April 16, 1909, about 7.30 A.M., the weather being fine and clear with a moderate south-westerly breeze, and the tide setting to the westward of little force, the twin screw steamship *Ortona*, of 7945 tons gross register, engines of 1750 horse power nominal, and a crew of 260 hands, was in the English Channel, about twenty-two miles south by west of the Eddystone lighthouse, steering N.E. magnetic, and making about fourteen knots through the water, in the course of a voyage from Gibraltar to Plymouth with a general cargo and passengers. In these circumstances those in charge of the *Ortona* saw, at a distance of about four miles, and bearing about three points on the port bow, a screw steamship which proved to be the *Tryst*, of 750 tons gross register, engines of 84 horse power nominal, and a crew of thirteen hands, from Swansea to Honfleur. She was steering S.E. by E. $\frac{3}{4}$ E. magnetic and making about eight knots. The *Ortona* kept her course and speed, and the *Tryst* approached without taking any steps to keep out of the way, and when she had drawn so close that a collision could not be avoided by her action alone, the helm of the *Ortona* was put hard-a-port, her whistle sounded one short blast, and her engines kept working full speed ahead. The two vessels, however, come into collision, the starboard bow of the *Tryst* striking the port side of the *Ortona* about amidships, and directly afterwards they again came into contact further aft.

The plaintiffs charged the defendants (inter alia) with neglecting to keep out of the way of the *Ortona* (1), with improperly

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by the other vessel until he has ascertained that she has no need of further assistance; and also

"(*b*) to give to the master or person in charge of the other vessel the name of his own vessel and of the port to which she belongs, and also the names of the ports from which she comes and to which she is bound.

"(2.) If the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act neglect or default. . . . ."

(1) Regulations for preventing collisions at sea, art. 19: "When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

attempting to cross ahead of the *Ortona* (1), and with failure to slacken her speed or stop or reverse her engines. (2)

The defence set up by the defendants was not accepted by the Court, namely, that those in charge of the *Tryst* observed close to on the starboard quarter a steamship which proved to be the *Ortona* overtaking the *Tryst*, and, as the overtaking vessel did not take any measures to keep clear, the helm of the *Tryst*, just before the collision, was put hard-a-starboard, but the two vessels came into contact.

The evidence shewed that, after falling alongside, the port propeller of the *Ortona* must have struck the starboard side of the *Tryst*, doing so much damage that the *Tryst* sank about two hours afterwards.

By par. 4 of the defence the defendants alleged that "after the said collision the *Ortona* steamed away from the *Tryst* without slackening her speed or rendering or attempting to render any assistance notwithstanding that repeated signals were made on the steam whistle of the *Tryst*," and the defendants charged those on board the *Ortona* with (inter alia) improperly porting, with failing to ease, stop, or reverse (art. 23), with neglecting to keep clear of the *Tryst* (3), and with neglect to comply with s. 422 of the Merchant Shipping Act, 1894. (4)

Aspinall, K.C., *D. Stephens*, and *H. M. Robertson*, for the plaintiffs, owners of the *Ortona*.

Laing, K.C., and *Lewis Noad*, for the defendants, owners of the *Tryst*.

The arguments of counsel sufficiently appear from the judgment. On the question of the duty of a vessel crossing so as to involve risk of collision the case of *The Albano* (5) was cited;

(1) Regulations for preventing collisions at sea, art. 22: "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

(2) Art. 23: "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

(3) Art. 24: "Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel . . . ."

(4) Ante, note (1), p. 333.

(5) [1907] A. C. 193.

1909
THE TRYST.

and as to the duty of "the person in charge" of each ship after a collision to render assistance to the other, *The Queen* (1), quoted in *The Sussex.* (2)

Cur. adv. vult.

1909, Oct. 26. THE PRESIDENT (SIR JOHN BIGHAM). I think I must hold the *Tryst* solely to blame for the collision.

It was at first contended that these were overtaking, and not crossing, ships, but that contention was abandoned. It is clear that they were crossing ships. The *Ortona* was steering a course of N.E. magnetic, and the *Tryst* a course of S.E. by E. $\frac{3}{4}$ E. magnetic, and the ships were approaching each other. The *Tryst* had the *Ortona* on her starboard side. In these circumstances it was the duty of the *Tryst* to give way and to keep clear of the *Ortona*, under art. 19, while it was the duty of the *Ortona* to keep her course and speed, under art. 21. The *Tryst's* look-out was bad. She failed to give way, and to this neglect of her duty the collision is, in my opinion, attributable.

It was then said that even if the *Tryst* were to blame in this respect, yet the *Ortona* did wrong in porting her helm, and that if she had not so ported she would have passed safely under the stern of the *Tryst*. This contention was also abandoned. It was obvious that when the order to put her helm hard-a-port was given there was imminent risk of collision, and I am advised by the Elder Brethren, and I believe, that the best thing then to do was to attempt to get the *Ortona* on a parallel course with the *Tryst*. For the *Ortona* to have reversed her engines would only have made matters worse, as there was not sufficient time to have stopped her way, and it would have prevented the head of the *Ortona* canting so quickly. The putting of the *Ortona's* helm hard-a-port was a seamanlike thing to do in the circumstances, and that it failed to prevent the collision cannot be attributed to any negligence on the part of those in charge of the *Ortona*; at all events it had the effect of rendering the impact much less serious than it would otherwise have been. Then it is said that the *Ortona* should be held partly to blame because she might and ought to have reduced her

(1) (1869) L. R. 2 A. & E. 354. (2) [1904] P. 236, at p. 247.

1909

THE TRYST.

The President.

speed, and it is pointed out that, according to the engineer's log, an interval of three minutes elapsed between the order from the bridge to stand by and the collision, but in my opinion those in charge of the *Ortona* acted all through for the best. There may have been some error of judgment, something might have been done which would seem wiser when considered after the event, but there was, in my opinion, nothing which could be described as negligence on the part of those in charge of the *Ortona*. The death blow to the *Tryst* was dealt under water by the port propeller of the *Ortona* striking the *Tryst's* starboard side as she was clearing her. An attempt was made to stop this propeller and an order was given from the *Ortona's* bridge, but it did not reach the engine room. This was probably due to the lever on the bridge not having been pulled sufficiently sharply; but, whatever the cause, I cannot attribute the failure of the lever to act to any negligence. In sudden emergencies the best of us are apt to make what may afterwards be called mistakes. The conclusion of fact at which I arrive is that no blame attaches to the *Ortona*.

There remains a point taken by counsel for the defendants at the conclusion of the plaintiffs' case. It was said that the master of the *Ortona* was guilty of statutory negligence inasmuch as he failed to stay by the *Tryst* until he had ascertained that she had no need of further assistance, as required by s. 422 of the Merchant Shipping Act, 1894, and that therefore the collision ought to be deemed to have been caused by the wrongful act, neglect, or default of the master of the *Ortona*. The facts are these: When the vessels came together the force of the two blows was slight, and the visible damage to the *Tryst* was neither serious nor such as to lead either those on board the *Ortona* or those on board the *Tryst* to suppose that the *Tryst* was in need of assistance; but the evidence satisfies me that those in charge of the *Ortona* suspected that the *Tryst* might have sustained, as, in fact, she had, damage under water from the action of the *Ortona's* port propeller. The evidence of the chief officer on this point is as follows. He was asked:

"After she struck you the second time what happened?—She slid off. We went full speed on the engines again, I put the

1909

THE TRYST.

The President.

telegraph back to full speed again, instead of stand by, and we righted her helm again.

"The vessels having passed clear, what did you do? In the first place did you hear any signal from the other vessel?—We saw a blast given on the steam whistle I could not understand; it was not an authorized signal of distress. We hoisted a signal asking if she required assistance, and got no answer."

In cross-examination he was asked:

"Why, then, did you stop your port engine?—That was after the first collision, when she was coming in again, knowing very well she came in on top of our propellers.

"It was to avoid doing damage to the propellers?—She might have done that.

"Your object was to avoid doing damage to the revolving propeller?—If possible, and also to help the ship back to get the stern round again.

"To counteract the swinging out of the port quarter?—Yes, but there was no time after that.

"No order was carried out, your port propeller continued ahead all the time?—I gave the order and it was put on the telegraph.

"Was it answered from the engine room?—I could not say. I gave the order. The third officer, who was standing by the telegraph, gave the order to stop, and before the action had time to have effect she was then again on top of us.

"There was no answer from the engine room as far as you know, and the propeller continued going full speed from first to last?—As far as I know.

"Did the master come on deck without being called?—Yes.

"And he was on deck how soon after the collision?—Within a minute.

"Was he on deck when the two whistle signals were heard on the other vessel?—No, he had just gone down. I sent down to him and told him I would hoist a signal.

"He had gone again?—Yes, gone down again, and he just came up in his pyjamas. I sent down immediately I hoisted the signal.

"How long was the interval between the two blasts she gave?—It might have been a minute or two.

1909

THE TRYST.

The President.

"How many times did she blow her whistle in all?—I only saw steam coming out twice.

"Notwithstanding that, you maintained your course and full speed?—I went down and asked the captain if he would turn back.

"Did you think it was necessary to turn back?—No, because he had no signals up and did not answer our 'S. G. C.'

"What does that mean?—'Do you require assistance?'

"How long would it be before you were out of sight of him for distinguishing signals?—Do you mean reading signals or seeing flags?

"Reading flags.—On that day you could read one three miles off, and you could see flags further than that by a good long distance, but she had no flags up at all; we could see if she had hoisted flags.

"Did you look?—All the time, for a long time until you could not see her at all scarcely.

"It was a good bump, the collision?—Yes, but she only seemed slightly damaged.

"What do you mean by slightly?—We could not see any holes above the water on the bows.

"No holes near the water level?—She seemed to be more dented than holed, she certainly did not look as if she had been damaged below water.

"Had you any communication from the engine room as to what had happened to your port propeller?—We wondered whether it had struck or not afterwards. We could not see very well at Plymouth.

"I was not talking about that. I meant did you get any information from the engine room after the collision?—I asked them if they had felt anything and they said no.

"When did you say that—how long after?—I asked the chief engineer somewhere about perhaps half-past 8, when I went to my berth.

"Not close to the collision?—I did not ask him then; the captain, I believe, went down.

"You had in your mind the possibility of the propeller having struck her?—Yes, I certainly had in my mind the possibility of it.

1909

THE TRYST.

The President.

"What did the captain reply when you asked him whether you should turn back?—'No, she has no signals of distress, go on.'

"Do you not think a long blast on the whistle is a signal of distress?—It is not recognized.

"If you were to hear a vessel blowing a number of long blasts on the whistle, would you not think there was something the matter with her after you had been in collision with her?—Certainly not.

"You have been in collision with a vessel; according to you, she was passing away astern, blowing long blasts on her whistle; do you mean to say it conveyed to you nothing?—It certainly conveyed nothing.

"And you took no measures?—We hoisted the signal to her.

"You know of course she sunk afterwards?—We heard that afterwards."

Then the third officer said:

"After the vessels parted can you tell me what took place?—We of course brought back to our course, and the other steamer kept on her's as far as we could see.

"Did she make any signal?—She blew her whistle twice.

"What kind of blasts?—Short blasts, so far as I could make out, five or six seconds.

"Did you take any steps?—We hoisted up signals asking her if she required assistance.

"Did you get any answer?—No, we did not see any flags at all.

"And you continued on your course?—We continued on our course."

Then there is the evidence of the master. He was asked:

"Then what was done with your vessel?—Immediately she got well clear I altered the helm, which was hard-a-port; I proceeded to bring her back to her course.

"Could you see or hear any signals from the other vessel?—No, I saw very little damage to her. The starboard side was very slightly indented. I thought there was nothing the matter with her.

"Did they make any signal to you?—After I got below he

1909

THE TRYST.

The President.

blew two blasts, and we sent up a signal, 'Do you want assistance?'

"Was any answer made?—Not the slightest; no ensign pulled up or anything.

"Did you yourself consider there was any reason for taking further steps?—No, there did not seem to be much the matter with her. The top-work was slightly bent—very little bent.

"You considered it prudent and safe to proceed?—Quite so. I sent for the chief engineer to ask him if there was any chance of the propeller hitting him, and he said no, the propeller was not touched."

Later on in cross-examination the master was asked:

"All you did was to keep on at full speed, and because he did not hoist flags you assumed he wanted nothing?—Because, seeing the damage on the bows, and feeling myself a slight bump—not so much of a bump as you often get along a dock wall.

"Do you not know the rule about exchanging names?—It was broad daylight, we could see his name and he could see mine."

Again he was asked:

"You do not think it was part of your duty to give to the master or person in charge of the other vessel the name of your vessel and of the port to which she belongs, and also the names of the ports from which she comes and to which she is bound? You did not do so?—No.

"You are an experienced seaman?—Yes, I have been to sea a number of years.

"Did you in the whole course of your experience ever hear of a collision between two steamers where the one maintained her course and speed throughout the whole business—in this case 14½ knots?—I did not think it was necessary to stand by.

"That is another matter. I am asking you, Did you ever hear in your whole life —— I have not inquired into cases of collision. You hear of cases where ships do go on."

Then there was something said about motor cars, and the witness was asked, "Were you in any particular hurry to get to Plymouth?" and his answer was, "We naturally wanted to get in."

1909

THE TRYST.

The President.

Then there is the evidence of a man named Matherson, who was on the look-out in the crow's nest. He was asked:

"Were you able to see the vessels part after the collision?—Yes.

"Were you able to see or hear any signals made to the other vessel?—I saw the *Ortona* put up three or four flags and the *Tryst* sounded two blasts, long blasts. I think that was all.

"Which happened first?—The flags.

"I think you then continued on your course?—Yes."

I think the fair conclusion to be drawn from this evidence is that those on board the *Ortona* suspected that damage might have been caused by the port propeller. I think, too, that, although the flag signals on the *Ortona* were not answered by any flag signals from the *Tryst*, the blowing of the latter's whistle ought to have conveyed to the *Ortona* that assistance was in fact needed. Instead of staying by the *Tryst* to clear up the doubt, or to ascertain what the whistle was intended to indicate, the *Ortona* steamed right away. I am quite satisfied that no staying by the *Tryst* on the part of the *Ortona* would have made any difference in the result. The *Tryst* would have gone to the bottom as she did whether the *Ortona* had been there or not, and in this sense the *Tryst* may be said to have had "no need of further assistance," but that is not what the statute means. One vessel is not to steam away from the other merely because nothing can be done to prevent the other vessel from sinking. The lives of those on board are to be thought of, and in this case it is impossible to say that the danger to life would not have been lessened by the *Ortona* standing by. Fortunately no lives were lost, but there was undoubtedly great peril. What are the statutory consequences, so far as the ship and shipowner are concerned, of the master's failure to stand by? They are that "in the absence of proof to the contrary" the collision "shall be deemed to have been caused" by the master's wrongful act, neglect, or default, thus rendering the ship and shipowner liable. But in this case it is proved to my satisfaction that the collision was due entirely to the fault of the *Tryst*, or, in other words, that it was not caused by the wrongful act, neglect, or default of the

1909

THE TRYST.

The President.

master or person in charge of the *Ortona*. The section, therefore, does not apply.

It may be that the master is guilty of a misdemeanour under sub-s. 3 of s. 422, the material part of which is as follows: "If the master or person in charge fails without reasonable cause to comply with this section he shall be guilty of a misdemeanour." That is a sub-section which deals only with the personal liability of the master or person in charge, and it does not contain the words "in the absence of proof to the contrary" which are found in sub-s. 2. It does not affect the liability of the ship or her owner. I therefore express no opinion as to the responsibility under this sub-section.

There will be judgment for the plaintiffs.

Solicitors for plaintiffs, owners of the *Ortona: Holman, Birdwood & Co.*

Solicitors for defendants, owners of the *Tryst: Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

THE END.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1st, 1909, will be as follows:—

In the First Series,
[1909] 1 Ch. [1909] 2 Ch.

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[1909] 1 K. B. [1909] 2 K. B. [1909] P.

In the Third Series,
[1909] A. C.

INDEX.

ACCIDENT—Ship — Collision — Fog — Sound signal not heard—Negligence—Inevitable accident - - - - - **300**
See SHIPPING. 7.

ADMINISTRATION—*Practice — Administration with Will annexed—Advertisements for Claims against Estate—Administrators' Undertaking to retain a certain Portion of Estate to meet possible Debts—Sureties dispensed with—Probate Act*, 1857 (20 *&* 21 *Vict. c.* 77), *s.* 81—*Order.*

The sole executrix and universal legatee and devisee of the deceased died without having obtained probate of his will.

Advertisements having been inserted for any creditors of his estate, and no answers having been received thereto, the executors of the executrix, on applying for a grant of administration with the will of the testator annexed, were excused from finding sureties, and their personal bond alone was accepted, upon their undertaking to retain, for the space of one year, assets of the testator equivalent to about four times the amount of his known debts (including his funeral expenses), in order to meet any possible claims against his estate. IN THE ESTATE OF HARPER - - - **Bargrave Deane J. 88**

—— Probate Administration de bonis non—Original administrator believed to be dead - - - - - - - **233**
See PROBATE. 1.

—— Will—Destruction—Intention — Executors according to the tenor—Form of grant
See WILL. **305**

ADMIRALTY.
See under SHIPPING.

ADMISSION—Ship — Collision — Admission by defendants that partly to blame—Practice—Burden of proof—Right to begin - - - - - - - **257**
See SHIPPING. 1.

—— Ship—Salvage — Pleading — Admission of facts—Non-admission of inferences—Exclusion of further evidence - **170**
See SHIPPING. 20.

ADULTERY.
See under DIVORCE.

ADVERTISEMENTS—For claims against estate—Sureties dispensed with — Administration with will annexed. - **88**
See ADMINISTRATION.

AFFIDAVIT—Limitation of liability—Shipping casualty—Plaintiff railway company—"Owners"—"Actual fault or privity"—Affidavit of general manager - **293**
See SHIPPING. 18.

ALLOWANCE—Nullity of marriage — Decree—Petition for an allowance—"Conduct of the parties" — Discretion of the Court - - - - - - - **90**
See NULLITY OF MARRIAGE. 1.

APPEAL — Summary Jurisdiction (Married Women) Act, 1895—Notes of proceedings in Court below—Duties of magistrates, and justices' clerks - - **24**
See DIVORCE. 1.

APPOINTMENT—Notaries public in a Colonial district—Practice—Melbourne notaries
See NOTARIES. **15**

AUSTRALIA — Melbourne notaries — Appointment—Practice - - - - - **15**
See NOTARIES.

BELLS—Church bells—Illegality of use of **6**
See ECCLESIASTICAL LAW. 5.

BILL OF LADING—Damage to cargo—Charter-party — Negligence clause — Duty of master—Onus of proof - - **219**
See SHIPPING. 14.

—— Exceptions and conditions — Damage to cargo—Seaworthiness — Negligence of shipowners' servants - - - **93**
See SHIPPING. 2.

BUNKER COAL—Ship—Mortgage—Freight **236**
See SHIPPING. 19.

BURIAL — Faculty for erection of vestry on disused burial ground—"Enlargement of church" - : - - - 310
See ECCLESIASTICAL LAW. 2.

CASES :—
—— *Bellanoch, The*, [1907] A. C. 269.
Discussed by C. A. THE CORINTHIAN. [1909] P. 260

—— *Blue Bell, The*, [1895] P. 242.
Referred to by Gorell Barnes, Pres. THE CLUTHA BOAT 147 - [1909] P. 36

—— *Buccleuch (Duke of), The*, [1891] A. C. 310.
Discussed by C. A. THE CORINTHIAN [1909] P. 260

—— *Dodd* v. *Dodd*, [1906] P. 189.
Approved by C. A. HARRIMAN *v.* HARRIMAN - - - [1909] P. 123

—— *Failes* v. *Failes*, [1906] P. 326.
Overruled by C. A. HARRIMAN *v.* HARRIMAN - - - [1909] P. 123

—— *Fanny M. Carrill, The*, (1888) 13 App. Cas. 455, n.
Discussed by C. A. THE CORINTHIAN [1909] P. 260

—— *Mills* v. *Milward*, (1889) 15 P. D. 20.
Dictum of Butt J. in, approved by Bargrave Deane J. GILL *v.* GILL [1909] P 157

—— *N. Strong, The*, [1892] P. 105.
Referred to by C. A. THE ST. PAUL [1909] P. 43

—— *Oxford (Bishop of)* v. *Henly*, [1907] P. 88.
See OXFORD (BISHOP OF) *v.* HENLY (No. 2). Arches Court of Canterbury [1909] P. 319

—— *Schwan, The*, [1908] P. 356.
Reversed by C. A. - - [1909] P. 93

—— *St. Paul, The*, [1908] P. 320.
Affirmed by C. A. - - [1909] P. 43

—— *Smith* v. *Smith*, [1905] P. 249.
Overruled by C. A. HARRIMAN *v.* HARRIMAN - - - [1909] P. 123

—— *Tweedsdale, The*, (1889) 14 P. D. 164.
Held not applicable by Bucknill J. THE CRAIGELLACHIE - [1909] P. 1

CHARTERPARTY—Damage to cargo—Bill of lading—Negligence clause — Duty of master—Onus of proof - - - 219
See SHIPPING. 14.

—— Demurrage—Construction of charterparty —"In regular turn" - - - 27
See SHIPPING. 17.

CHURCH AND CHURCH DISCIPLINE.
See under ECCLESIASTICAL LAW.

CHURCHWARDENS — Duty of — Faculty — Family pew — Allotment of church seats by churchwardens—Seats not to be filled up before commencement of service - - - - - - 195
See ECCLESIASTICAL LAW. 4.

COAL—Ship—Mortgage—Freight—Bunker coal
See SHIPPING. 19. 236

COLLISION—Admission by defendants that partly to blame—Practice—Burden of proof—Right to begin - - - 257
See SHIPPING. 1.

—— Close-hauled vessels on opposite tacks—Narrow channel—Overtaking—Claim for compensation for loss of life—Remoteness of damage - - 176
See SHIPPING. 3.

—— Compulsory pilotage—Practice—Evidence of pilot - - - - - - 183
See SHIPPING. 4.

—— Failure to stand by—Statutory presumption of fault—Proof to the contrary - 333
See SHIPPING. 5.

—— Fog—"Fairway" of river—Duty to ring bell when at anchor - - - 36
See SHIPPING. 6.

—— Fog—Sound signal not heard—Negligence —Inevitable accident - - - 300
See SHIPPING. 7.

—— Lerwick Harbour—Narrow channel - 109
See SHIPPING. 9.

—— Sailing vessel—Steam trawler—Duty of steam vessel to keep clear - - 1
See SHIPPING. 11.

—— Snow—In or approaching falling snow—Sound signals—Speed - - - 43
See SHIPPING. 8.

—— Sound signals—Contributing to collision
See SHIPPING. 12. 260

—— Thames, River—Overtaking and overtaken vessels—Keeping to the south of mid-stream going down - - - 287
See SHIPPING. 10.

COLLISIONS AT SEA (REGULATIONS FOR PREVENTING), 1897, arts. 9, 20 - 1
See SHIPPING. 11.

—— arts. 15, 16 - - - - - - 43
See SHIPPING. 8.

—— arts. 17 (*b*), 24 - - - - - 176
See SHIPPING. 3.

—— art. 25 - - - - - - 103, 109
See SHIPPING. 9, 13.

—— art. 28 - - - - - - - 260
See SHIPPING. 12.

COLONIES—Appointment of notaries public in a Colonial district — Practice — Melbourne notaries - - - - 15
See NOTARIES.

COMPENSATION—Workmen's compensation—Ship—Collision—Claim for compensation for loss of life—Remoteness of damage - - - - - 176
See SHIPPING. 3.

CO-RESPONDENT—Divorce—Damages against co-respondent—Death of co-respondent—Liability of his executor - - 187
See DIVORCE. 3.

COSTS—Divorce—Petitioner and intervener both condemned in costs of King's Proctor
See DIVORCE. 2. 308

—— Probate—Lunatic defendant—Position of official solicitor, if appointed guardian ad litem - - - - - - 157
See PROBATE. 2.

CRIMINAL LAW—Ecclesiastical law—Criminal suit by letters of request — Church discipline — Proceedings by default—Sentence of deprivation ab officio et a beneficio - - - - - - 319
See ECCLESIASTICAL LAW. 1.

CUSTOM— Jewish marriage — Nullity — Money paid into bank, in joint names, in nature of dower—Petition to restore so-called dower - - - - - - - 217
See NULLITY OF MARRIAGE. 2.

"CUSTOMARY TURN"—Demurrage—Charterparty - - - - - - 31, n.
See SHIPPING. 16.

DAMAGE AND DAMAGES—Divorce—Damages against co-respondent—Death of co-respondent—Liability of his executor
See DIVORCE. 3. 187

—— Ship—Collision—Claim for compensation for loss of life—Remoteness of damage
See SHIPPING. 3. 176

—— Ship—Damage to cargo—Bill of lading—Charterparty — Negligence clause — Duty of master—Onus of proof - 219
See SHIPPING. 14.

—— Ship—Damage to jetty—Negligence—Onus of proof—Force majeure - - 163
See SHIPPING. 15.

DEATH—Administration de bonis non—Original administrator believed to be dead 233
See PROBATE. 1.

—— Divorce — Practice — Damages against co-respondent—Death of co-respondent—Liability of his executor— - - 187
See DIVORCE. 3.

—— Presumption of death — Surrounding circumstances—Form of oath - - 115
See PROBATE. 3.

DEMURRAGE — Charterparty, Construction of —"In regular turn" - - - - 27
See SHIPPING. 17.

—— Charterparty—"Customary turn" - 31, n.
See SHIPPING. 16.

DESTRUCTION — Will — Intention—Executors according to the tenor — Universal legatees in trust—Form of grant - 305
See WILL.

DIVORCE — *Appeal — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39) —*Notes of Proceedings in Court below—Duties of Magistrates' and Justices' Clerks—Practice.*

Where upon the hearing of a summons under the Summary Jurisdiction (Married Women) Act, 1895, the clerk of the justices allows a shorthand note to be taken in place of the ordinary longhand note, he must certify the transcript of such note as correct, and cannot discharge his duty with regard to the making of the note unless he so certifies the transcript of the shorthand note which he allowed to be taken.

Unless the parties both agree to the taking of a shorthand note in place of the longhand note usually taken in such cases by the clerk to the justices, such longhand note must be taken, and in any event no extra expense must fall upon the parties in case either of them should require a transcript of the note for the purpose of an appeal.

On the facts proved, the wife was shewn to have been compelled to leave her husband under circumstances which, in law, amounted to desertion by him.

An agreement not to take any proceedings "for separation, or divorce, or maintenance," signed by the wife after the separation, held bad. ROYLE *v.* ROYLE - - - **Div. Ct. 24**

2. —— *Costs—Wife's Petition—Decree Nisi —King's Proctor's Plea—Adultery of Petitioner —Intervention of alleged Adulterer—Withdrawal of Answers to King's Proctor's Plea—Motion to dismiss Petition—Petitioner and Intervener both condemned in Costs of King's Proctor — Practice — Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12), *s.* 3.

Where a person, charged by the King's Proctor with having committed adultery with the petitioner, intervened and filed an answer to the King's Proctor's plea, such person, as well as the petitioner, was, upon the dismissal of the petition, condemned in the costs of the King's Proctor. DAVISON *v.* DAVISON (MONTGOMERIE INTERVENING) - **Bargrave Deane J. 308**

3. —— *Damages against Co-respondent — Order for Payment into Court—Death of Co-respondent—Liability of his Executor—Jurisdiction of Divorce Court to enforce Order—Practice.*

On the hearing of a petition for divorce by a husband against his wife the jury assessed damages against the co-respondent at 1500*l.*, a decree nisi was pronounced, and the co-respondent was ordered "within one month from the service of the order to lodge in Court the said sum of 1500*l.*" Within a month of the order the co-respondent died without having paid the money into Court. On an application by the petitioner for an order against the executor of the co-respondent to pay the damages and costs out of the assets of his testator :—

Held (reversing the decision of the President), that there was no provision in the Divorce Act or Rules enabling the executor of a co-respondent to be brought before the Court, the action was a personal action and the cause of action

DIVORCE—*continued.*

did not survive, and that there was no remedy against the executor in the Divorce Court, and no order for payment could be enforced against the executor in that Court. BRYDGES *v.* BRYDGES AND WOOD - - **C. A. 187**

4. —— *Nullity of Marriage—Variation of Settlement — Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12)—*Form of Order.*

By indenture of settlement dated June 8, 1894, and made between the respondent, the petitioner, and trustees, the respondent, in consideration of the marriage then intended between himself and the petitioner, transferred to the trustees certain stocks, shares, and securities upon trust (inter alia) to pay the income arising therefrom to himself for life, then to the petitioner, if she should survive him, for her life, whether covert or discovert, without power of anticipation, and if there should be no child of the said intended marriage who should attain a vested interest, then in trust for the respondent absolutely.

The marriage having been annulled at the instance of the wife, she presented a petition to vary the settlement. The income of the wife, as found by the registrar, was 197*l.*, and that of the husband 674*l.* per annum.

The Court ordered that the matter be referred to one of the conveyancing counsel of the Court to prepare a deed to provide for the placing in the hands of trustees (to be appointed) a sum, which the respondent was by this order directed to provide, sufficient to produce 100*l.* per annum; that this income be paid to the respondent; and that he be ordered to pay 100*l.* a year to the petitioner for her life dum sola vixerit. SHARPE *v.* SHARPE - - **Bargrave Deane J. 20**

5. —— *Settlement* (*Variation of*), *Petition for—Petition served on Third Person, who has appeared and pleaded—Refusal to hear Person so served—"Person who may have any Legal or Beneficial Interest in the Property in respect of which the Application is made"—Procedure—Practice—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Divorce Court Rules*, *r.* 97.

The petitioner, having obtained a decree absolute for a divorce from his wife, presented a petition for variation of the settlement made on their marriage. By the settlement a fund brought into settlement by the appellant, the wife's mother, was settled upon trusts for the wife for life, and then for the husband for life, with the usual limitations in favour of children of the marriage, and, subject to the foregoing trusts, in trust for the appellant. There were two children of the marriage under age, of whom the petitioner had the custody. The petition for variation of the settlement prayed that the Court would direct the trustees to make to the petitioner during the joint lives of himself and his former wife certain annual payments out of the income of the trust funds, and to make such further order in the matter as might be just. The petitioner caused to be served with the petition, among others, the appellant, who appeared thereto and put in an answer, to which

DIVORCE—*continued.*

the petitioner put in a reply. Subsequently, when the matter came on for hearing before the registrar, the petitioner applied to him that the appellant should not be heard thereon, on the ground that she was not a person who had any legal or beneficial interest in the property in respect of which the application was made within the meaning of r. 97 of the Divorce Court Rules. The registrar acceded to that application, and on appeal the judge affirmed his decision. On appeal against the judge's order:—

Held that, the petitioner not having obtained any order dismissing the appellant from the proceedings on the petition, she was, as having been made a party thereto, entitled to be heard, and the order was therefore wrong and must be rescinded.

Quære, whether the appellant was entitled to be made a party to the petition. *In re* LORD VIVIAN *v.* LADY VIVIAN - - - **C. A. 57**

6. —— *Wife's Petition—Effect of Separation Order under Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 5.

In July, 1905, the respondent deserted the petitioner and never returned to her or contributed to her support. In March, 1906, a stipendiary magistrate, upon the complaint of the petitioner that the respondent had deserted her, made an order under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, that the respondent should pay a specified weekly sum to the petitioner for her support; the order contained also a provision under s. 5 (*a*) of the Act that the petitioner should no longer be bound to cohabit with the respondent. In 1907 the respondent committed adultery, and in December, 1907, the petitioner presented a petition for dissolution of the marriage on the grounds of adultery and of desertion for two years without reasonable excuse:—

Held, that the effect of the non-cohabitation clause in the magistrate's order was to prevent the continuance of the desertion after the date of the order; that there had therefore not been desertion without reasonable excuse for two years by the respondent so as to satisfy the requirements of s. 27 of the Matrimonial Causes Act, 1857; and that the petitioner was not entitled to a decree for dissolution of the marriage.

Dodd v. *Dodd*, [1906] P. 189, approved.

Smith v. *Smith*, [1905] P. 249, and *Failes* v. *Failes*, [1906] P. 326, overruled.

Where a married woman applies for an order under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, upon the ground of desertion only, a non-cohabitation clause is in general an inappropriate remedy and should not be inserted in the order. HARRIMAN *v.* HARRIMAN **C. A. 123**

—— Nullity of marriage.
See under NULLITY OF MARRIAGE.

DIVORCE COURT RULES, r. 97 - - **57**
See DIVORCE. 5.

DOMICIL — Marriage — Validity — Husband a British subject domiciled in India—Hindu—Personal capacity to contract marriage with an English Christian woman - - - - - - 67
See MARRIAGE.

DOWER—Nullity of marriage—Jewish marriage—Custom—Money lodged in bank, in joint names, in nature of dower—Petition to restore so-called dower - 217
See NULLITY OF MARRIAGE. 2.

ECCLESIASTICAL LAW — *Criminal Suit by Letters of Request—Church Discipline Act*, 1840 (3 & 4 *Vict. c.* 86), *s.* 13—*Proceedings by Default—Reservation of the Sacrament of the Supper of Our Lord—Disobedience to Monition—Contempt—Service not prescribed or appointed by Book of Common Prayer or sanctioned by the Ordinary—Monstrance — Litany addressed to the Virgin Mary—Service of Benediction with the Reserved Sacrament—Sentence of Deprivation ab officio et a beneficio.*

The incumbent of a parish church in a diocese within the province of Canterbury having been sued as defendant in a criminal suit by letters of request in the Court of Arches was pronounced by the Court to have been guilty of an ecclesiastical offence in that within two years past the sacrament of the Lord's Supper had been reserved by his authority in the parish church of which he was the incumbent, and that a light was kept burning before it, and thereupon the Court decreed a monition to issue against him, admonishing him to refrain in future from causing or permitting the reservation of the sacrament in his church either over the altar or elsewhere, and also from keeping burning or causing or permitting to be kept burning a light in front of the reserved sacrament. This monition was duly served on the incumbent, but was disobeyed by him, and subsequently another criminal suit by letters of request was brought against him in the Court of Arches. The amended articles in this second suit charged the defendant with having within two years past offended against the law ecclesiastical by—

(1.) on an occasion subsequent to that referred to in the previous suit reserving or causing or permitting to be reserved in his church upon or over the Communion table consecrated bread which had been consecrated at a celebration of the Holy Communion and not consumed and keeping or causing or permitting to be kept burning a light in front of it;

(2.) doing or causing or permitting to be done the same acts notwithstanding and in disobedience to the monition of the Court;

(3.) as a public service immediately after the service of evensong on a Sunday, in the presence of the congregation then assembled, exhibiting to them a monstrance containing the consecrated bread above mentioned, transferred there from the tabernacle in which it had been placed, this exposition of the consecrated bread being followed by hymns, versicles and responses, and a metrical litany to the Virgin Mary, and the service ending with a ceremonious benediction of the congregation with the consecrated bread contained in the monstrance; all such acts, ceremonies, and service being unlawful variations from the form and order prescribed by the Book of Common Prayer.

The incumbent did not appear to defend the suit, and the amended articles having been admitted to proof, the evidence of eye witnesses in support of the charges above referred to was giving at the hearing, and evidence was also then given that the bishop of the diocese had not sanctioned any part of the acts, ceremonies, or service referred to in the amended articles, and that the light, tabernacle, and monstrance there mentioned had been introduced into the church without the sanction of a faculty.

The Dean of the Arches, being of opinion that the offences charged against the incumbent had been sufficiently proved, and that by the reservation of the consecrated bread with a light burning in front of it notwithstanding and in disobedience to the monition of the Court and the direction of the bishop the incumbent had been guilty of incorrigible contumacy, pronounced a sentence of deprivation depriving the incumbent ab officio et a beneficio. OXFORD (BISHOP OF) *v.* HENLY. (Second suit.)

Arches Court of Canterbury 319

2. —— *Faculty—Faculty for Erection of Vestry on disused Burial Ground—"Enlargement of Church"—Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

The rector and churchwardens of a parish united with six other parishes in the city of London and the churchwardens of such six parishes petitioned the Ordinary for a faculty authorizing a choir vestry for the choir of the parish church of the united parishes and an extension of the clergy vestry of the same church being built on a disused burial ground adjoining the church, and to which the Disused Burial Grounds Act, 1884, applied; the choir vestry and extension of the clergy vestry to be placed close alongside the church and with a door leading into it. The grant of the faculty was opposed by the London County Council. It appeared in evidence that the existing accommodation for the robing of the choir was most inconvenient and unsuitable, and that there was no reasonable objection to the proposed extension of the clergy vestry; special services attended by very many clergy being held in the church, and members of the Corporation of London when attending the ordinary services robing in the clergy vestry. It further appeared that it was desired by the rector that the two vestries should be separated by a movable wooden partition, so that on occasions they might on the removal of the partition form one long room:—

Held, that the Court in its discretion would decree a faculty to issue for the erection of the choir vestry and the extension of the clergy vestry, but that a movable partition between them could not be sanctioned, as the two vestries when they formed one room—upwards of 50 ft. long and 26 ft. wide—would give much more accommodation than would be necessary for the clergy and choir to robe in when in attendance for the services of the Church.

Held, also, that what was authorized by the faculty was an "enlargement of the church" within the meaning of the 3rd section of the Disused Burial Grounds Act, 1884; that section providing that after the passing of that Act it shall not be lawful to erect any buildings upon any disused burial ground—defined to include any burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of certain Acts—except for the purpose of enlarging a church, chapel, meeting house, or other places of worship. ST. MARGARET, LOTHBURY (RECTOR, &C.) *v.* LONDON COUNTY COUNCIL

Consistory Ct. of London 310

3. —— *Faculty—Faculty for the Erection of Rood Beam surmounted by Crucifix with Figures of the Virgin Mary and St. John refused—Rood—Illegal Church Ornament—Ornaments Rubric—2 & 3 Edw. 6, c. 1.*

A rood with the accompanying figures of the Virgin Mary and St. John erected on a beam surmounting the chancel screen is not a lawful church ornament in churches of the Church of England.

The vicar and churchwardens of a parish church in the diocese of London petitioned the Ordinary to authorize by faculty the erection of a beam across the entrance to the chancel of their parish church bearing the following inscription in Latin on its face, "O Lord God, Lamb of God, Son of the Father, that takest away the sins of the world," and surmounted by, on a central cross, the figure of our Lord, "crowned and reigning on the tree," and towards the ends of the beam on the one side the figure of the Virgin Mary and on the other side the figure of St. John; the crucifix and the other figures to be carved in wood, the height of the crucifix to be 13 ft. 10 in., and the two figures of the Virgin Mary and St. John to be each 3 ft. 6 in. high and to be raised above the level of the beam on brackets or pedestals:—

Held, that the faculty petitioned for must be refused, as the rood beam surmounted as proposed by the crucifix and the accompanying figures of the Virgin Mary and St. John was an illegal church ornament forbidden in churches of the Church of England. ST. PAUL, BOW COMMON (VICAR AND CHURCHWARDENS) *v.* INHABITANTS OF THE SAME

Consistory Ct. of London 245

4. —— *Faculty—Faculty Pew—Allotment of Church Seats by Churchwardens subject to Control of Ordinary—Duty of Churchwardens—Appropriation of Seats at all Services—Seats not to be filled before Commencement of Service.*

The churchwardens of a parish church have vested in them the allotment of seats in the body of the church amongst the parishioners subject to the control of the Ordinary and to the exemption existing in respect of faculty pews or seats. The allotment, however, in each case must be made in general terms so as to entitle the allottees to occupy the seats allotted to them at all the ordinary services held in the church; the churchwardens not being entitled to attach to the allotment a condition excluding any allottee from the right to attend in the seats allotted any of the ordinary services of the Church prescribed by the rubrics. Thus persons to whom the churchwardens have allotted seats in the body of the church are entitled by law to occupy the seats so allotted to them not only during the Sunday morning service, but also during the Sunday evening service and at the early Sunday morning service held for the administration of Holy Communion, as well as at the ordinary services held on Christmas Day, Ash Wednesday, and Good Friday, and at any other ordinary service held in the church whether on Sundays or on weekdays.

Moreover, up to the commencement of service the seats allotted by the churchwardens to parishioners cannot legally be occupied by other persons against the will of the persons to whom they have been allotted.

Observations as to the circumstances which would at the present day justify the Ordinary in decreeing a faculty for appropriating pews or seats to private individuals. CLAVERLEY (VICAR, &C.) *v.* CLAVERLEY (PARISHIONERS, &C.); CLAVERLEY (CHURCHWARDENS) *v.* CLAVERLEY (VICAR, &C.); GATACRE AND LEGH *v.* CLAVERLEY (VICAR, &C.)

Consistory Ct. of Hereford 195

5. —— *Faculty — Refusal of Faculty for Crucifix and Figures of St. John and the Virgin Mary upon Rood Beam—Discretion—Refusal of Faculty for Alterations to facilitate Use of Church Bell as Sanctus Bell—Illegality of Use of Church Bell for that Purpose.*

The vicar and churchwardens of a parish church in the diocese of Bath and Wells petitioned the Ordinary for a faculty for, amongst other alterations in the church, the erection of a carved oaken beam across the chancel arch to be surmounted by a crucifix and the figures of St. John and the Virgin Mary, and also for certain structural alterations so that one of the church bells might be rung from the interior of the church. It appeared in evidence that no exceptional services were held in the church, but that ornaments of the minister other than surplices were worn by the officiating clergy in the Communion Service; that the sacrament was reserved to take to the sick; that there was a crucifix in the vestry and also one in the church; and that one of the church bells was rung from the belfry or tower of the church at certain moments in the Communion Service as a sanctus bell. It further appeared that the vicar of the parish intended that the proposed crucifix upon the rood beam with its attendant figures should be an aid to devotion and a defence against erroneous teaching, and that the main object of the proposed alteration in respect of one of the church bells was that the bell might be rung from the interior of the church during the celebration of the Holy Communion.

The Chancellor of the diocese of Bath and Wells refused in his discretion to grant a faculty for the erection of a crucifix and its attendant figures upon the rood beam, being of opinion

ECCLESIASTICAL LAW—*continued.*
that the erection was not contemplated simply and purely as a matter of decoration.

He also refused to sanction by faculty the alterations proposed to enable one of the church bells to be used from the interior of the church as a sanctus bell.

The tolling or ringing of one of the church bells of a parish church during the consecration prayer in the Communion Service at the moment of the elevation of each of the sacred elements as a sanctus bell is illegal. ST. JOHN THE EVANGELIST, CLEVEDON (VICAR AND CHURCHWARDENS) *v.* ALL HAVING INTEREST
Consistory Ct. of Bath and Wells 6

—— Notaries public.
See under NOTARIES.

EMPLOYER AND WORKMAN—Ship—Collision—Claim for compensation for loss of life—Remoteness of damage - **176**
See SHIPPING. 3.

EVIDENCE—Pilot, Evidence of — Ship — Collision—Compulsory pilotage—Practice
See SHIPPING. 4. **183**

—— Salvage—Pleading—Admission of facts—Non-admission of inferences—Exclusion of futher evidence - - **170**
See SHIPPING. 20.

—— Will torn up in testator's presence without his authority—Subsequent ratification inadmissible—Words missing from will when pieced together—Oral evidence
See PROBATE. 2. **157**

EXECUTOR — Divorce — Practice — Damages against co-respondent—Death of co-respondent—Liability of his executor
See DIVORCE. 3. **187**

—— Will—Destruction—Intention — Executors according to the tenor — Universal legatees in trust—Form of grant - **305**
See WILL.

FACULTY—Church bell as sanctus bell—Illegality - - - - - - - **6**
See ECCLESIASTICAL LAW. 5.

—— Erection of vestry on disused burial ground, Faculty for — "Enlargement of church" - - - - - - **310**
See ECCLESIASTICAL LAW. 2.

—— Family pew—Allotment of church seats by churchwardens — Seats not to be filled up before commencement of service - - - - - - **195**
See ECCLESIASTICAL LAW. 4.

—— Rood—Illegal church ornament — Ornaments rubric - - - - - **245**
See ECCLESIASTICAL LAW. 3.

"FAIRWAY"—Collision—Fog—"Fairway" of river — Duty to ring bell when at anchor—Medway Conservancy By-laws
See SHIPPING. 6. **36**

FOG—Ship—Collision—"Fairway" of river—Duty to ring bell when at anchor—Medway Conservancy By-laws - **36**
See SHIPPING. 6.

—— Ship—Collision—Sound signal not heard—Negligence—Inevitable accident - **300**
See SHIPPING. 7.

FORCE MAJEURE—Ship—Damage to jetty—Negligence—Onus of proof - - **163**
See SHIPPING. 15.

FREIGHT—Ship—Mortgage—Bunker coal **236**
See SHIPPING. 19.

GRANT OF ADMINISTRATION — Will — Destruction — Intention — Executors according to the tenor — Universal legatees in trust—Form of grant - **305**
See WILL.

GUARDIAN AD LITEM—Probate—Practice—Lunatic defendant—Position of official solicitor, if appointed guardian ad litem - - - - - - - **157**
See PROBATE. 2.

HINDU — Marriage — Validity — Husband a British subject domiciled in India—Personal capacity to contract marriage with an English Christian woman **67**
See MARRIAGE.

HUSBAND AND WIFE—Divorce.
See under DIVORCE.

JETTY—Damage to—Ship—Negligence—Onus of proof—Force majeure - - **163**
See SHIPPING. 15.

JEWISH MARRIAGE — Nullity — Custom — Money lodged in bank, in joint names, in nature of dower—Petition to restore so-called dower - - - - **217**
See NULLITY OF MARRIAGE. 2.

JUDICATURE ACTS—Summons—Service—Probate Contentious Rules - - - **118**
See PROBATE. 4.

JURISDICTION — Divorce — Wife's petition — Effect of separation order under Summary Jurisdiction (Married Women) Act, 1895 - - - - - **123**
See DIVORCE. 6.

—— Divorce Court — Damages against co-respondent—Death of co-respondent—Liability of his executor—Jurisdiction of Divorce Court to enforce order - **187**
See DIVORCE. 3.

—— Summary jurisdiction.
See under SUMMARY JURISDICTION (MARRIED WOMEN).

JUSTICES — Appeal — Summary jurisdiction (married women)—Notes of proceedings in Court below—Duties of magistrates' and justices' clerks - - - **24**
See DIVORCE. 1.

KING'S PROCTOR — Costs — Wife's petition — Decree nisi—King's Proctor's plea—Petitioner and intervener both condemned in costs of King's Proctor - **308**
See DIVORCE. 2.

LADING—Bill of.
See under BILL OF LADING.

LERWICK HARBOUR—Narrow channel—Collision - - - - - - - **109**
See SHIPPING. 9.

LIMITATION OF LIABILITY — Shipping casualty—Plaintiff railway company—"Owners"—"Actual fault or privity" Affidavit of general manager - - **293**
See SHIPPING. 18.

LUNACY—Probate—Practice — Lunatic defendant—Position of official solicitor, if appointed guardian ad litem - - **157**
See PROBATE. 2.

MAGISTRATES.
See under JUSTICES.

MANAGER—Limitation of liability—Shipping casualty—Plaintiff railway company—"Owners" — "Actual fault or privity"—Affidavit of general manager - **293**
See SHIPPING. 18.

MARRIAGE—*Validity—Celebration in England—Husband a British Subject domiciled in India—Hindu—Personal Capacity to contract Marriage with an English Christian Woman.*

Any incapacity of either a man or a woman, which, though recognized and enforced by the law of the domicil of either, is of a kind to which the Courts of this country refuse recognition, does not render a marriage celebrated here invalid on account of any such incapacity.

A foreigner or a British subject domiciled abroad who enters into a contract of marriage with an Englishwoman domiciled in England—a marriage which would be recognized by the law of England as valid if contracted between persons domiciled in this country—does not carry with him any disability of a personal character imposed by the law of his domicil so as to preclude him from contracting a valid marriage with her in this country.

A foreigner or a British subject domiciled abroad who, being in England, contracts in due form according to the laws of England a marriage with a person domiciled in England is not to be permitted to assert that he was under the burden of an incapacity, imposed by the law of the foreign domicil, to do that which he in fact did voluntarily and in due form according to the laws of England, and he cannot repudiate the marriage on the ground of such personal incapacity.

Where both parties to a marriage are domiciled in a country the laws of which forbid them to marry, considerations may apply differing from those which would be applicable in cases where one party only is domiciled in a country the laws of which forbid such a marriage. CHETTI (VENUGOPAL) *v.* CHETTI (VENUGOPAL) - - - **Gorell Barnes, Pres. 67**

MARRIAGE—*continued.*

—— Dissolution of marriage.
See under DIVORCE.

—— Divorce.
See under DIVORCE.

—— Nullity of marriage.
See under NULLITY OF MARRIAGE.

—— Nullity of marriage—Variation of settlement—Form of order - - - **20**
See DIVORCE. 4.

MARRIED WOMAN—Divorce.
See under DIVORCE.

MARRIED WOMEN'S PROPERTY ACT, 1882—Jewish marriage—Nullity—Dower—Custom - - - - - - **217**
See NULLITY OF MARRIAGE. 2.

MATRIMONIAL CAUSES ACTS—Divorce.
See under DIVORCE.

—— Nullity of marriage.
See under NULLITY OF MARRIAGE.

—— Nullity of marriage—Variation of settlement—Form of order - - - **20**
See DIVORCE. 4.

MEDWAY—Collision—Fog—"Fairway" of river—Duty to ring bell when at anchor—Medway Conservancy By-laws - **36**
See SHIPPING. 6.

MEDWAY CONSERVANCY BY-LAWS, arts. (43) (*c*), 48 - - - - - - **36**
See SHIPPING. 6.

MELBOURNE NOTARIES — Appointment of notaries public in a Colonial district—Practice - - - - - - **15**
See NOTARIES.

MERCHANT SHIPPING.
See under SHIPPING.

MONITION—Church Discipline Act, 1840—Disobedience to monition — Contempt — Sentence of deprivation ab officio et a beneficio - - - - - - **319**
See ECCLESIASTICAL LAW. 1.

MORTGAGE—Ship— Freight—Bunker coal **236**
See SHIPPING. 19.

NEGLIGENCE—Ship—Bill of lading—Exceptions and conditions—Damage to cargo—Seaworthiness—Negligence of shipowners' servants - - - - **93**
See SHIPPING. 2.

—— Ship—Collision—Fog—Sound signal not heard—Inevitable accident - - **300**
See SHIPPING. 7.

NEGLIGENCE—*continued.*

—— Ship—Damage to jetty—Onus of proof—Force majeure - - - - **163**
See SHIPPING. 15.

NEGLIGENCE CLAUSE—Charterparty—Ship—Bill of lading—Damage to cargo—Duty of master—Onus of proof - - **219**
See SHIPPING. 14.

NOTARIES—*Appointment of Notaries Public in a Colonial District — Practice — Melbourne Notaries.*

In considering an application by a person to be appointed a notary public in a Colonial district, the Master of the Faculties attaches great weight to the views of a society of notaries practising in the district. An appointment was, however, made for Melbourne, in the State of Victoria, notwithstanding the opposition of such a society, on very strong evidence that the applicant was personally suitable, and that the number of existing notaries at Melbourne was insufficient for the convenience of the public. FAY *v.* SOCIETY OF NOTARIES FOR THE STATE OF VICTORIA - - **Ct. of Faculties 15**

NULLITY OF MARRIAGE—*Decree—Petition for an Allowance—Registrar's Report—Motion thereon—Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12)—"*Conduct of the Parties*"—*Discretion of the Court—Petition dismissed with Costs.*

After a decree of nullity, as well as after a decree of dissolution of marriage, the "conduct of the parties" is one of the material matters to be taken into consideration in dealing with any application for an allowance; and the discretion of the Court, in ordering or refusing an allowance, must be exercised according to the circumstances of each particular case. DUNBAR (OTHERWISE WHITE) *v.* DUNBAR
Gorell Barnes, Pres. 90

2. —— *Jewish Marriage—Custom—Money lodged in Bank, in joint Names, in Nature of Dower—Application under Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 17—*Petition to restore so-called Dower—Order.*

In contemplation of the marriage of the petitioner and respondent, both of whom were of the Jewish persuasion, a sum of money, provided by the intended wife or her relations, was handed to the intended husband and was lodged in a bank in their joint names, in accordance with an alleged custom in the Jewish community, the money being treated as in the nature of dower.

A decree annulling the marriage having been granted upon the wife's petition, she presented a "petition to restore dower," the application being referred to the registrar under the Married Women's Property Act, 1882, s. 17.

Upon the report of the registrar as to the facts and figures:—

The Court confirmed the report and ordered that a sum of 400*l.* standing in a bank in the joint names of the petitioner and respondent should be handed back to the petitioner for her sole and absolute use. JOSEPH (OTHERWISE KING) *v.* JOSEPH - **Bigham, Pres. 217**

NULLITY OF MARRIAGE—*continued.*

—— Variation of settlement Form of order **20**
See DIVORCE. 4.

ORAL EVIDENCE.
See under EVIDENCE.

"**OWNERS**"—Limitation of liability—Shipping casualty—Plaintiff railway company—"Actual fault or privity"—Affidavit of general manager - - - - **293**
See SHIPPING. 18.

PEWS.
See under ECCLESIASTICAL LAW.

PILOTAGE — Ship — Collision — Compulsory pilotage—Practice—Evidence of pilot
See SHIPPING. 4. **183**

PLEADING—Salvage—Practice—Admission of facts—Non-admission of inferences—Exclusion of further evidence - **170**
See SHIPPING. 20.

PRACTICE—Administration.
See under ADMINISTRATION.

—— Divorce.
See under DIVORCE.

—— Evidence.
See under EVIDENCE.

—— Pleading—Salvage—Admission of facts—Non-admission of inferences—Exclusion of further evidence - - **170**
See SHIPPING. 20.

—— Ship—Collision—Admission by defendants that partly to blame—Burden of proof—Right to begin - - - - **257**
See SHIPPING. 1.

PRESUMPTION—Death—Surrounding circumstances—Form of oath - - **115**
See PROBATE. 3.

—— Ship—Collision—Failure to stand by—Statutory presumption of fault—Proof to the contrary - - - - **333**
See SHIPPING. 5.

PROBATE — *Administration de bonis non—Original Administrator believed to be dead—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 74.

The original administrator of a deceased intestate could not be found and was believed to be dead. Additional assets having been discovered due and payable to the estate of the intestate, the Court, by virtue of s. 74 of the Probate Act of 1857, granted administration de bonis non to one of the next of kin, upon her affidavit that she believed the original administrator (her brother) to be dead or beyond the seas. IN THE ESTATE OF SAKER
Bargrave Deane J. 233

2. —— *Lunatic Defendant — Position of Official Solicitor if appointed Guardian ad litem—Costs—Will torn up in Testator's Presence without his Authority—Subsequent Ratification inadmissible—Words missing from Will when*

PROBATE—*continued.*

pieced together—Oral Evidence—Probate—Form of Order—Practice.

The official solicitor, if appointed guardian ad litem to a lunatic defendant in a probate suit, has no greater rights and is in no better position than any other solicitor appearing for a party in a probate suit, except that he will probably be allowed, out of the estate, costs properly incurred in the conduct of the defence.

Where a will has been torn up without the testator's authority, he cannot, by any subsequent ratification of the destruction, render the act a valid revocation of the will.

The dictum of Butt J. in *Mills* v. *Milward*, (1889) 15 P. D. 20, approved.

The Court will not order to be inserted in the probate words actually missing from a torn will which has been pieced together, but the practice to be followed in such a case, where satisfactory oral evidence is before the Court proving what the missing words were, is to allow a document shewing what those words are proved to have been to be annexed to the probate. GILL *v.* GILL - - - **Bargrave Deane J. 157**

3. —— *Presumption of Death—Surrounding Circumstances—Form of Oath—Practice.*

The Court will, under certain circumstances, modify the usual form of oath in a case of presumption of death.

Where a passenger on a cross-channel steamer was missed when within about four miles from the port of arrival in France, the Court allowed a creditor, who was seeking administration, to swear that he believed the person in question died on that occasion, upon an affidavit that notice of motion had been duly served upon the wife and daughter of the presumed deceased. IN THE ESTATE OF WALKER **Gorell Barnes, Pres. 115**

4. —— *Summons—Service—Practice—Probate Contentious Rules*, 1862, *r.* 100—*Rules of Supreme Court, Order* LIV., *r.* 4E—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 16, 23—*Judicature Act*, 1875 (38 *&* 39 *Vict. c.* 77), *s.* 18.

Rule 100 of the Probate Contentious Rules, 1862, remains in force notwithstanding Order LIV., r. 4E, of the Rules of the Supreme Court, and therefore in the case of a summons in a probate action one clear day's service before the return thereof is sufficient. *In re* HAILSTONE. HOPKINSON *v.* CARTER - **C. A. 118**

—— Administration with will annexed—Advertisements for claims against estate—Sureties dispensed with - - **88**
See ADMINISTRATION.

PROBATE CONTENTIOUS RULES, 1862, r. 100 - - - - - - **118**
See PROBATE. 4.

PROOF—Burden of—Ship—Collision — Admission by defendants that partly to blame—Right to begin - - - - **257**
See SHIPPING. 1.

—— Onus of proof—Damage to cargo—Bill of lading — Charterparty — Negligence clause—Duty of master - - **219**
See SHIPPING. 14.

PROOF—*continued.*

—— Onus of proof—Ship—Damage to jetty—Negligence—Force majeure - - **163**
See SHIPPING. 15.

—— Ship—Collision—Failure to stand by—Statutory presumption of fault—Proof to the contrary - - - - **333**
See SHIPPING. 5.

RAILWAY—Limitation of liability—Shipping casualty—Plaintiff railway company—"Owners"—"Actual fault or privity"—Affidavit of general manager - **293**
See SHIPPING. 18.

RATIFICATION — Will torn up in testator's presence without his authority—Subsequent ratification inadmissible - **157**
See PROBATE. 2.

REMOTENESS — Ship — Collision — Claim for compensation for loss of life—Remoteness of damage - - - - **176**
See SHIPPING. 3.

RIVER—Collision—Fog—"Fairway" of river—Duty to ring bell when at anchor—Medway Conservancy By-laws - **36**
See SHIPPING. 6.

ROOD—Faculty—Illegal church ornament—Ornaments rubric - - - **245**
See ECCLESIASTICAL LAW. 3.

RULES OF SUPREME COURT, Order LIV. (Applications and Proceedings at Chambers), r. 4E - - - - - **118**
See PROBATE. 4.

SAILING VESSEL—Collision—Steam trawler—Duty of steam vessel to keep clear **1**
See SHIPPING. 11.

SALVAGE—Ship—Practice—Pleading—Admission of facts — Non-admission of inferences—Exclusion of further evidence
See SHIPPING. 20. **170**

SEPARATION — Divorce — Wife's petition — Effect of separation order under Summary Jurisdiction (Married Women) Act, 1895 - - - - - **123**
See DIVORCE. 6.

SERVICE — Summons — Probate Contentious Rules - - - - - - **118**
See PROBATE. 4.

SETTLEMENT—Divorce — Variation of settlement, Petition for—Petition served on third person—Refusal to hear person so served—Procedure - - - **57**
See DIVORCE. 5.

—— Nullity of marriage—Variation of settlement—Form of order - - - **20**
See DIVORCE. 4.

SHIPPING—*Collision — Admission by Defendants that partly to blame—Practice—Burden of Proof—Right to begin.*

In an action of damage by collision, the

SHIPPING—*continued.*

plaintiffs, by their statement of claim, alleged that they had suffered damage by reason of a collision between their vessel and the defendants' vessel solely caused by the negligent navigation of the latter, and they charged the defendants with specific acts of negligence and with breaches of certain articles of the regulations for preventing collisions at sea. The defendants, by their defence, denied that the collision and damage were so caused, and alleged that they were solely due to the negligent navigation of the plaintiffs' vessel, and, after charging the plaintiffs with specific acts of negligence and breaches of certain articles of the same regulations, the defendants counter-claimed for the damage they had suffered by reason of the collision. By their reply, the plaintiffs, as to the defence, joined issue, and, as to the counter-claim, denied the allegations therein contained. Subsequently the defendants, by letter, admitted that the collision was contributed to by fault on the part of those in charge of their vessel :—

Held that, on the pleadings as they stood, even coupled with the defendants' admission of contributory negligence, it was for the plaintiffs to begin, as the burden of proof was upon them to shew affirmatively that the defendants' vessel was solely to blame. THE CADEBY

Bigham, Pres. 257

2. —— *Bill of Lading — Exceptions and Conditions—Damage to Cargo—Seaworthiness—Negligence of Shipowners' Servants.*

A cargo of sugar was shipped at Bremen on board the defendants' steamship for conveyance to London under a bill of lading containing (inter alia) the following exceptions and conditions :—(1.) "all accidents loss and damage whatsoever from defects in hull tackle apparatus machinery boilers steam and steam navigation or from perils of the seas . . . . or from any act neglect or default whatsoever of the pilot master officers engineers crew stevedores servants or agents of the owners in the management loading stowing discharging or navigation of the ship or . . . . otherwise and the owners being in no way liable for any consequences of the causes before mentioned." (2.) "It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship her tackle machinery and appurtenances shall be considered a fulfilment of every duty warranty or obligation and whether before or after the commencement of the said voyage."

On the voyage the sugar was damaged by the inflow of sea water into the hold owing to the plug of a "three-way cock," fitted on the main bilge pipe, not having been properly adjusted by the engineer so as only to be open at one time in two directions, and to the failure of a non-return valve to act in consequence of a piece of spun yarn preventing its closing :—

Held by the Court of Appeal (reversing the decision in the Court below, [1908] P. 356), that the defendant shipowners were not liable, for there was not sufficient evidence to shew that the vessel was unseaworthy when she left Bremen, and, in so far as the damage to the

SHIPPING—*continued.*

plaintiffs' cargo was occasioned by either or both of the two causes—namely, the three-way cock not being properly adjusted, and the non-return valve not being properly closed — these were either defects in machinery, or defects caused by the neglect of the engineer, against which the defendant shipowners were equally protected by the terms of the bill of lading. THE SCHWAN

C. A. 93

3. —— *Collision—Close-hauled Vessels on Opposite Tacks—Narrow Channel—Overtaking—Action in personam—Claim for Compensation for Loss of Life—Remoteness of Damage—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 17 (*b*), 24—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58).

Two sailing flats were beating to windward at night down the Mersey, and in the process of tacking backwards and forwards across the river the plaintiff's flat gradually overtook the other ; but before she had quite done so, and whilst the two vessels were on opposite tacks, they came into collision :—

Held that, in the circumstances, the rule applicable was art. 17 (*b*) of the regulations for preventing collisions at sea, and, therefore, the defendants' vessel, which, at the material time, was close-hauled on the port tack, was to blame for not keeping out of the way of the plaintiff's vessel close-hauled on the starboard tack.

The anchor of the defendants' vessel fouled the painter of the boat which was towing astern of the plaintiff's vessel, and, in endeavouring to release the vessels by cutting the boat's painter, the master of the plaintiff's vessel was dragged overboard and drowned :—

Held, that the defendants, by the negligence of whose servants in the navigation of their vessel the accident was brought about, were liable for the sum paid by the plaintiff under the Workmen's Compensation Act, 1906, to the dependants of the master of the plaintiff's vessel, and that this amount was recoverable as damages in the present action brought in admiralty in personam under the general jurisdiction of the High Court. THE ANNIE

Bargrave Deane J. 176

4. —— *Collision — Compulsory Pilotage - Practice—Evidence of Pilot.*

Where, in an action of damage by collision, the defendants admit that the collision was caused by the negligent navigation of their vessel, but allege that they are not liable as such negligence was solely that of the pilot compulsorily in charge, and neither side calls the pilot, the Court will, in its discretion, afford him an opportunity of tendering evidence on his own behalf, if he so desire, subject to cross-examination by both sides. THE CARDIFF

Bargrave Deane J. 183

5. —— *Collision — Failure to stand by—Statutory Presumption of Fault—Proof to the contrary—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 422, *sub-ss.* 2, 3.

In an action of damage by collision, in which those in charge of the defendants' steam vessel

SHIPPING—*continued.*

were found alone to blame, it appeared that the plaintiffs' vessel and the defendants' vessel, after the first contact, fell alongside, and, whilst clearing, the port propeller of the plaintiffs' vessel struck the starboard side aft of the defendants' vessel, under water, with the result that the defendants' vessel sank in a couple of hours ; but it was not known to those in charge of either vessel at the time of the impact that the damage was so serious. The plaintiffs' vessel did not stop, but those in charge hoisted flag signals asking if any assistance was required, and, only hearing long blast whistle signals from the defendants' vessel, they steamed away :—

Held that, though those in charge of the plaintiffs' vessel suspected that damage might have been done by the port propeller, and though the blowing of the whistle on the defendants' vessel ought to have conveyed to the minds of those in charge of the plaintiffs' vessel that assistance was needed, still the collision could not be deemed to have been caused by the wrongful act, neglect, or default of the master of the plaintiffs' vessel, as "proof to the contrary" had been given within the meaning of s. 422, sub-s. 2, of the Merchant Shipping Act, 1894, and the further question whether the master had been guilty of a misdemeanour did not arise, for sub-s. 3 of the same section dealt only with the personal liability of the master, so that the liability of the ship or of her owners was not affected. THE TRYST

Bigham, Pres. 333

6. —— *Collision—Fog—"Fairway" of River—Duty to ring Bell when at anchor—Medway Conservancy By-laws, arts.* 43 (*c*), 48—*Seamanlike Precaution.*

The plaintiffs' sailing barge, whilst at anchor to the northward and westward of the Upper Mussel buoy in Long Reach of the river Medway, was run into by a steam tender, in charge of the defendant, conveying liberty men from Chatham Dockyard to two of His Majesty's vessels moored further down the river. The weather was thick with fog, and, though daylight, the barge was exhibiting her riding light ; but her bell was not being rung. The barge was suddenly seen a few yards ahead, and the stem of the tender struck the port side amidships of the barge a heavy blow and sank her :—

Held by Sir Gorell Barnes, President, that the negligence of those in charge of both vessels had contributed to the collision, and both were to blame, for the barge was in the "fairway" as defined in *The Blue Bell*, [1895] P. 242, and, therefore, on account of the fog, bound to ring her bell under art. 43 (*c*) of the Medway Conservancy By-laws ; but if not coming under that article, she was, in the circumstances, and in the opinion of the nautical assessors, bound to indicate her position by sound signals as a seamanlike precaution within the meaning of art. 48 of the same by-laws. The defendant was to blame for continuing to keep the tender under way after the fog became so thick that the look-out could only see a few yards ahead, and, considering the force with which the blow must have been struck, the tender was being navigated at an immoderate speed. THE CLUTHA BOAT 147

Gorell Barnes, Pres. 36

SHIPPING—*continued.*

7. —— *Collision—Fog—Sound Signal not heard—Negligence—Inevitable Accident.*

The defendants' vessel going down the river Thames suddenly encountered fog, and, whilst proceeding to bring up, those in charge saw the riding light and heard the bell of the plaintiffs' vessel lying at anchor ; but it was then too late to avoid a collision :—

Held, that the evidence failed to shew any negligence on the part of those in charge of the defendants' vessel in not seeing the light or hearing the sound signals sooner, and, therefore, on the ground of inevitable accident, the loss must rest where it fell. THE NADOR

Bigham, Pres. 300

8. —— *Collision—In or approaching Falling Snow—Sound Signals—Speed—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 15, 16.

A cruiser proceeding up, and a New York liner proceeding down, the Solent on nearly opposite courses, and in about mid-channel, sighted one another at a distance of about half a mile, each having the other a little on the port bow. The speed of both vessels was nearly ten knots, and the cruiser when seen was coming out of a snow flurry, whilst the liner was in comparatively clear weather. Those in charge of the cruiser, under the mistaken impression that the liner was starboarding, starboarded their helm, thereby bringing their vessel across the bows of the liner, and, at the last, ported to throw their quarter clear. Those in charge of the liner stopped, then blew one short blast and ported, at the same time reversing the starboard engine, and subsequently also the port engine ; but the two vessels came into collision, the liner striking the cruiser on the starboard side amidships and sinking her.

In the Court below the cruiser was found alone to blame for improper starboarding. On appeal it was contended that the liner was also to blame for excessive speed in the condition of the weather, and for failure to indicate her position by sound signals :—

Held by the Court of Appeal, that both charges against the liner failed, for, though good seamanship required that she should be going at a speed which would be moderate when she herself was enveloped in falling snow, her speed at the material time, and in the weather conditions then prevailing, was not excessive ; and, secondly, though good seamanship should have suggested to those in charge of the liner the necessity as in the analogous case of fog—*The N. Strong*, [1892] P. 105—of giving warning of the presence of their vessel by sounding the signal when approaching falling snow, yet as both vessels saw one another at a distance and in sufficient time to enable them, with reasonable care, to pass each other in safety, the absence of sound signals on the part of the liner did not contribute to the collision.

Quære whether, when the liner was approaching falling snow, the responsibility for giving

SHIPPING—*continued.*

sound signals rested with the master or with the pilot in charge by compulsion of law.

Decision of Gorell Barnes, Pres., [1908] P. 320, affirmed. THE ST. PAUL - - **C. A. 43**

9. —— *Collision — Lerwick Harbour — Narrow Channel—Regulations for Preventing Collisions at Sea*, 1897, *art.* 25.

The harbour of Lerwick, in the Shetland Islands, is not, except so far as its northern and southern entrances may be so regarded, a narrow channel within the meaning of art. 25 of the regulations for preventing collisions at sea. THE SEYMOLICUS - - **Bargrave Deane J. 109**

10.—*Collision.— River Thames— Overtaking and Overtaken Vessels—Keeping to the South of Mid-stream going down.*

The plaintiffs' and the defendants' steamships, proceeding down the river Thames, came into collision, in the upper part of Galleon's Reach, owing in part to the defendants' vessel, which was leading, and which was to the southward of mid-channel, attempting, by starboarding, to pass to the northward of a dredger, moored in about mid-stream, thereby tending to throw herself across the course of the plaintiffs' vessel, which was coming down on the north side of the river, and also making to pass on the north side of the dredger. Both vessels were found to blame, the defendants' vessel, as the overtaken vessel, for not keeping her course, and the plaintiffs' vessel, as the overtaking vessel, for not stopping so as to keep out of the way of the defendants' vessel when he saw what that vessel was doing. As a matter of seamanship also both vessels were to be deemed in fault for disregarding the understanding on the river by which, for the safety of navigation, steamships going down keep to the southward of mid-stream, thereby leaving the northern side of the river free for vessels coming up. THE GERE **Bargrave Deane J. 287**

11. —— *Collision — Sailing Vessel — Steam Trawler—Duty of Steam Vessel to keep clear— Regulations for Preventing Collisions at Sea*, 1897, *arts.* 9, 20.

A steam trawler fishing in the North Sea, with her trawl down over her starboard quarter, and exhibiting a black ball to indicate how she was engaged, was making from two and a half to three knots on a N.N.E. course, when she came into collision with a small sailing vessel which was making about six knots, and heading S.W. close hauled on the starboard tack. Those in charge of the trawler seeing the sailing vessel heading for them thought that she wished to speak them, and when they realized that this was not so, it was too late to do anything. The sailing vessel, owing to having no look-out, failed to observe the trawler until close to :—

Held that, though the sailing vessel was to blame for having no look-out, the steam trawler was also to blame, for she might, by a small alteration of her course, have avoided the collision, and should, therefore, have acted under art. 20 of the regulations for preventing collisions at sea, by which a steam vessel must keep out of the way of a sailing vessel.

SHIPPING—*continued.*

The Tweedsdale, (1889) 14 P. D. 164, held not applicable. THE CRAIGELLACHIE **Bucknill J. 1**

12. —— *Collision — Sound Signal — Contributing to Collision—Regulations for Preventing Collisions at Sea, art.* 28.

The plaintiffs' and the defendants' steamships, whilst proceeding, the one up, and the other down, the south channel of the river St. Lawrence, sighted one another at a distance of something under a mile, and were, at that time, practically end on, within the meaning of art. 18 of the regulations for preventing collisions at sea. Those in charge of the defendants' vessel, in breach of the above article, starboarded, and were found alone to blame for the collision which followed. Those in charge of the plaintiffs' vessel ported, in accordance with art. 18, blew a short blast, in accordance with art. 28, and steadied. Shortly afterwards they hard-a-ported, but did not blow another short blast to indicate the course taken. In the Court below it was found that not blowing the port helm signal, when the hard-a-porting took place, had no effect on the collision :—

Held by the Court of Appeal, varying the decision of the Court below, that the plaintiffs' vessel was also to blame, for the statutory presumption of fault could not be avoided except by shewing—which could not be done in this case—that the breach of the rule could not by possibility have contributed to the collision.

The case of *The Bellanoch*, [1907] A. C. 269, was decided on its own peculiar facts, and does not modify the doctrine laid down in *The Fanny M. Carvill*, (1888) 13 App. Cas. 455, n., which was followed in *The Duke of Buccleuch*, [1891] A. C. 310. THE CORINTHIAN - - **C. A. 260**

13. —— *Collision—Swansea Entrance Channel—Application of art.* 25 *of the Regulations for Preventing Collisions at Sea*, 1897—*Good Seamanship.*

Art. 25 of the regulations for preventing collisions at sea applies to the entrance channel formed by the east and west pier at Swansea, so that it is incumbent on a steam vessel in that narrow channel to keep to that side of mid-channel which lies on her starboard hand, but circumstances may prevent the rule operating to its full extent throughout the channel, for when a vessel is coming away from the tidal basin of the Prince of Wales Dock on the east side, and is proceeding down the channel, she will, in order to get on her proper west side, have to cross the channel leading up to the Ocean Dry Dock, or other dock in the west channel, towards which another vessel, coming in, may be making. In such a case good seamanship dictates that the vessel which will reach the point of intersection of the channels reasonably in advance of the other should keep on, and that the other should wait, though, if both are approaching the point at about the same time, it will be reasonable for the vessel which has the tide against her to wait until the other has passed. THE PRINCE LEOPOLD DE BELGIQUE **Gorell Barnes, Pres. 103**

14. —— *Damage to Cargo—Bill of Lading—Charterparty—Negligence Clause—Duty of Master—Onus of Proof.*

In a contract for the purchase of a parcel of wood goods, to be shipped at a foreign port and delivered c.i.f. in England, the buyer stipulated for "tonnage to be engaged on the conditions of the charterparty attached." The form of charterparty so attached contained an exception exonerating the shipowner from liability for the negligence of his servants. The charterparty made between the seller of the goods and the shipowner contained this exception, but the master of the vessel on which the goods were shipped, on the invitation of the ship's local agent, and under the impression that the negligence clause was incorporated by the words "all other conditions as per charterparty," signed a bill of lading which did not repeat the provision in favour of the shipowner.

Owing to negligent navigation there was a partial loss of the goods, and in an action of damage for short delivery brought by the buyer of the goods, as holder of the bill of lading, against the shipowner:—

Held, that the defendant shipowner was liable, for though it was the duty of the master, before signing the bill of lading, to have taken care that it contained the negligence clause, his omission to do so, and consequent want of authority, did not prevent the plaintiff from relying upon the document, as the defendant shipowner, upon whom the onus of proof lay, had failed to shew that the plaintiff, as holder of the bill of lading, had notice or knowledge of the contents of the charterparty, for the effect of the plaintiff, as buyer, sending to the seller of the goods the form of charterparty attached to the contract went no further than to advise the seller that the charterparty to be made by him as shipper of the goods with the shipowner must not contain terms less favourable to the plaintiff, as receiver of the goods under the bill of lading, than those in the form attached to the contract.
THE DRAUPNER - - - - **C. A. 219**

15. —— *Damage to Jetty—Ship—Negligence—Onus of Proof—Force majeure.*

The plaintiffs, the harbour authority of Workington, sued the defendants, the owners of a steamship, for damage to their jetty situate at the junction of, and between, the river Derwent and the harbour. The defence in substance was that the plaintiffs invited the defendants' vessel, which was in charge of a compulsory pilot, to enter the harbour at a time when there was one foot less water than shewn by the tide table, so that, when approaching the entrance, with only two feet of water under her, the head of the vessel was canted to port towards the jetty by a freshet, on her port quarter, of two knots running down the river, whilst a strong breeze was acting on her starboard side, with the result that, though the pilot ordered the engines to be put full speed astern and the order was obeyed, with hand reversing gear, in twenty-two seconds, the way was not taken off in time to prevent the stem of the vessel striking the jetty:—

Held, that the defendants were not liable, as they had discharged the onus of proof by rebutting the prima facie case of negligence against them, for the damage complained of arose from a combination of circumstances consisting of less water than usual, a strong breeze, and a freshet, which together amounted to force majeure. THE BOUCAU - - - **Bargrave Deane J. 163**

16. —— *Demurrage—Charterparty—"Customary turn."*

Appeal by defendants, the West of England China Stone and Clay Company, of St. Austell, against a decision of the judge of the Truro County Court in favour of the plaintiff, Edward W. Turner, of Garston, owner of the steamship *Sheila*.

By charterparty dated March 26, 1907, it was agreed between the plaintiff as owner of the *Sheila* and the agents of the defendants that the ship should proceed to Great Western Railway jetties, Fowey, and there load from the said merchants "in the customary manner a full and complete cargo of china clay and china stone in bulk . . . . customary turn by Great Western Railway as for steamers at Fowey to be allowed the merchants (if the ship be not sooner despatched) for loading the said cargo at Fowey." If required, the vessel was to lie ten days on demurrage at 8*s.* per hour for every hour's detention over and above the said lying time.

The vessel arrived at Fowey at 5 A.M. on Thursday, March 28, and was moored to a buoy in the harbour, waiting for a berth. At 10 o'clock A.M. on March 29 the master was informed that a berth was vacant, and the ship was moored alongside the berth at 10.15, but no cargo was loaded that day, as it was Good Friday. Loading was started at 2.45 A.M. on Saturday, March 30, but, in consequence of the failure of the charterers to send down sufficient cargo to the jetties, only about 150 tons of cargo was got on board at 10 P.M. on that day, whereas it was alleged that if the cargo had been down the whole could have been easily loaded by that time and the ship got to sea. The stevedores were, it is alleged, constantly waiting for waggons to come from the clay pits. The full cargo of 534 tons was not completed until 3 P.M. on Tuesday, April 2, 1907, and the ship sailed from Fowey at 3.30 P.M. on that day. The plaintiff claimed 25*l.* 8*s.* demurrage from 12 o'clock midnight on Saturday, March 30, to April 2, 1907—63½ hours at 8*s.* per hour.

DIVISIONAL COURT: We are of opinion that this appeal fails. The learned judge has found that in fact the delay was caused by the failure of the charterers to provide a cargo, and the time taken to do so was not a reasonable time. THE SHEILA (December 3, 1907) Reported [1909] P. 31, n.

17. —— *Demurrage—Construction of Charterparty—"In regular turn."*

By charterparty it was agreed between the plaintiff, shipowner, and the defendants, charterers, that the plaintiff's vessel should "proceed to the Nob near Topsham in the river Exe, or to Topsham Quay, as ordered on arrival . . . .

SHIPPING—*continued.*

and deliver the (defendants' cargo of 180 tons of phosphate) in regular turn with other seagoing vessels at the average rate of thirty tons per weather working day."

The plaintiff's vessel was ordered to, and duly arrived at, the Nob; but, though ready to deliver her cargo, she was kept waiting some days whilst another vessel, also consigned to the defendants, and already there, was being discharged by lighters sent by the defendants, after which the discharge of the plaintiff's vessel was proceeded with. The plaintiff claimed demurrage, at the agreed rate per day, on the ground that the time allowed for unloading began to count from the day the vessel was in her discharging berth at the Nob ready to deliver her cargo, and that the lay days had been exceeded. The defendants contended that they had complied with the terms of the charterparty by commencing the discharge of the plaintiff's vessel "in regular turn" on the day after the completion of the discharge of the other vessel at the particular discharging berth to which the plaintiff's vessel had been ordered :—

Held by the Divisional Court (Sir Gorell Barnes P. and Bargrave Deane J.), affirming the judgment of the Court below in favour of the defendants, that 'in regular turn" at the Nob meant one vessel at a time. THE CORDELIA
Div. Ct. 27

18. —— *Limitation of Liability — Shipping Casualty — Plaintiff Railway Company — "Owners"—"Actual fault or privity" — Affidavit of General Manager—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 59, *sub-s.* 2; *ss.* 503, 695, 719.

In an action of limitation of liability brought by a railway company under s. 503 of the Merchant Shipping Act, 1894, against cargo owners and others to limit the liability of the plaintiff company as owners of a vessel lost at sea, the evidence of the plaintiffs was, by consent, taken by affidavit, and the plaintiffs relied on an affidavit made by the general manager of the company stating (inter alia) that the loss occurred without the "actual fault or privity" of the plaintiffs :—

Held by Bargrave Deane J., that the affidavit was sufficient and that it was made by the proper person. THE YARMOUTH
Bargrave Deane J. 293

19. —— *Mortgage—Ship—Freight—Bunker Coal.*

Bunker coal was supplied in this country to a British ship on the personal credit of her owners, a limited company registered and having its office in England. The vessel left in ballast for the River Plate, and, her owners having become involved in financial difficulties, mortgagees took constructive possession of her when about to return with a valuable cargo. During the homeward voyage a quantity of the coal was consumed, and, on the arrival of the vessel in this country, the freight was collected by a receiver appointed by the Court, the net proceeds, less necessary disbursements, being paid into Court. On the application of the mortgagees

SHIPPING—*continued.*

for payment out to them of the freight in Court, the vendor of the coal claimed a deduction in his favour on the ground that the coal had been used in earning the freight :—

Held, that the mortgagees in possession were entitled to an order for payment out to them of the balance of the freight in Court without any deduction on account of the coal consumed, for, though the coal was used in earning the freight, it was coal which had been sold to and was the property of the mortgagors, and, therefore, the claimant, the unpaid vendor, had no interest in the coal or in the freight. EL ARGENTINO
Bigham, Pres. 236

20. —— *Salvage — Practice — Pleading — Admission of Facts—Non-admission of Inferences —Exclusion of Further Evidence — Value of Salved Property.*

To recover remuneration for services rendered to a stranded steamship, seven actions of salvage were commenced on behalf of eight tugs and the crews of two lifeboats. These actions were consolidated and one defence was put in, the material paragraph of which stated that "the defendants admit the facts alleged in the various statements of claim . . . . but not the inferences sought to be drawn from the said facts, and they submit themselves to the judgment of the Court thereon."

At the trial leave was asked on behalf of some of the salvors to put in the log of the defendants' vessel, and, on behalf of other salvors, to amend their statement of claim, on the ground, in both cases, that discovery of the defendants' documents, obtained after the defence had been delivered, particularly the letters and telegrams of the defendants' master, had disclosed material facts tending to lead to inferences increasing the value of the services rendered by these plaintiffs :—

Held, that both applications must be refused, the first on the ground that further evidence at the trial as to the salvage services was inadmissible, the Court being only concerned with the inferences to be drawn from the admitted facts, and the second on the additional ground that the application came too late, as it should have been made before the trial, after discovery had been obtained.

After the delivery of the statements of claim, and after the date of the affidavit of value filed by the defendants, it was ordered that "each side be at liberty to call evidence as to value." At the trial the values of the plaintiffs' vessels were agreed, but objection was taken to the defendants' affidavit giving the value of the stranded vessel at 28,000*l.*, her cargo 58,817*l.*, and freight at risk nil—total 86,817*l.* On the balance of testimony the Court fixed the value of the ship at 40,000*l.*, and of the cargo at 75,000*l.*, bringing the total up to 115,000*l.*, and, on this enhanced value, made separate awards to the various salvors, amounting in the aggregate to 7,275*l.* THE BUTESHIRE - - **Bargrave Deane J. 170**

SNOW — Collision — In or approaching falling snow—Sound signal—Speed - **43**
See SHIPPING. 8.

SOLICITOR — Probate — Practice — Defendant lunatic—Position of official solicitor, if appointed guardian ad litem - 157
See PROBATE. 2.

SOUND SIGNALS—Collision—In or approaching falling snow—Speed - - - 43
See SHIPPING. 8.

—— Contributing to collision - - - 260
See SHIPPING. 12.

—— Not heard, Sound signal—Ship—Collision — Fog — Negligence — Inevitable accident - - - - - - 300
See SHIPPING. 7.

STATUTES:—

1548.

2 & 3 Edw. 6, c. 1- - - - - 245
See ECCLESIASTICAL LAW. 3.

1840.

3 & 4 Vict. c. 85, s. 13—*Church Discipline* 319
See ECCLESIASTICAL LAW. 1.

1857.

20 & 21 Vict. c. 77, s. 74—*Probate* - 233
See PROBATE. 1.

—— —— s. 81 - - - - - 88
See ADMINISTRATION.

1859.

22 & 23 Vict. c. 61, s. 5—*Matrimonial Causes*
See DIVORCE. 5. 57

1873.

36 & 37 Vict. c. 66, ss. 16, 23—*Judicature*
See PROBATE. 4. 118

1875.

38 & 39 Vict. c. 77, s. 18—*Judicature* - 118
See PROBATE. 4.

1882.

45 & 46 Vict. c. 75, s. 17—*Married Women's Property* - - - - - 217
See NULLITY OF MARRIAGE. 2.

1884.

47 & 48 Vict. c. 72, s. 3—*Disused Burial Grounds* - - - - - 310
See ECCLESIASTICAL LAW. 2.

1894.

57 & 58 Vict. c. 60, s. 59, sub-s. 2; ss. 503, 695, 719—*Merchant Shipping* - 293
See SHIPPING. 18.

—— —— s. 422, sub-ss. 2, 3 - - - 333
See SHIPPING. 5.

1895.

58 & 59 Vict. c. 39 — *Summary Jurisdiction (Married Women)* - - - 24
See DIVORCE. 1.

—— —— s. 5 - - - - - 123
See DIVORCE. 6.

STATUTES—*continued.*

1906.

6 Edw. 7, c. 58—*Workmen's Compensation* 176
See SHIPPING. 3.

1907.

7 Edw. 7, c. 12—*Matrimonial Causes* - 20
See DIVORCE. 4.

—— —— - - - - - - - 90
See NULLITY OF MARRIAGE. 1.

—— —— s. 3 - - - - - 308
See DIVORCE. 2.

SUMMARY JURISDICTION.
See under JURISDICTION.

SUMMARY JURISDICTION (MARRIED WOMEN)—Appeal—Notes of proceedings in Court below—Duties of clerks
See DIVORCE. 1. 24

SUMMONS — Service — Probate Contentious Rules - - - - - - 118
See PROBATE. 4.

SURETIES — Dispensed with — Administration with will annexed—Advertisements for claims against estate - - - 88
See ADMINISTRATION.

SWANSEA ENTRANCE CHANNEL—Collision —Good seamanship - - - 103
See SHIPPING. 13.

THIRD PARTY—Divorce—Variation of settlement, Petition for—Petition served on third person—Refusal to hear person so served—Procedure - - - 57
See DIVORCE. 5.

TRAWLER — Collision — Sailing vessel—Steam trawler—Duty of steam vessel to keep clear - - - - - - - 1
See SHIPPING. 11.

VARIATION OF SETTLEMENT — Divorce — Nullity of marriage.
See under SETTLEMENT.

VICTORIA—Melbourne notaries—Appointment —Practice - - - - - 15
See NOTARIES.

WILL—*Destruction—Executors according to the Tenor—Universal Legatees in Trust—Form of Grant.*

A testatrix by her will left all she possessed to two persons, P. and L., or the survivor of them, in trust to pay the whole income arising from her estate to her husband during his life, and at his death to realize the estate and divide the proceeds equally amongst her four children.

The will was retained in the possession of the testatrix, who on several occasions referred to it as if it were in force, and indicated where it would be found when wanted.

After her death the will was found in the

WILL—*continued.*

place indicated, but it was in a number of fragments, all enclosed in a sealed envelope. The fragments, when pieced together, made up the complete document :—

Held (all parties consenting), that the will might be pronounced for ; that, in the absence of a direction to pay debts, the trustees were not executors according to the tenor ; but that, as, in their capacity of universal legatees and devisees in trust, their interest was paramount to that of the husband, the proper form of order to make would be to grant administration, with the will annexed, to them (P. and L.) as universal legatees and devisees in trust. IN THE ESTATE OF MACKENZIE - **Bargrave Deane J. 305**

—— Will torn up in testator's presence without his authority—Subsequent ratification inadmissible—Words missing from will when pieced together—Oral evidence *See* PROBATE. 2. 157

WORDS—"Actual fault or privity" - - **293**
See SHIPPING. 18.

——"Enlargement of church" - - - **310**
See ECCLESIASTICAL LAW. 2.

—— "Fairway" of river - - - - - **36**
See SHIPPING. 6.

—— "Owners" - - - - - - **293**
See SHIPPING. 18.

—— "customary Turn" - - - **31, n.**
See SHIPPING. 16.

—— "in regular Turn" - - - - **27**
See SHIPPING. 17.

WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.

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